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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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RICHARD JOHNSTON,

Petitioner,

v.

ROBERT LeGRAND, et al.,

Respondents.

Case No. 3:12-cv-00557-MMD-WGC

ORDER

This action is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Nevada state prisoner represented by counsel. Before the Court is respondents' motion to dismiss this action. (Dkt. no. 30.)

**I. PROCEDURAL HISTORY**

Petitioner was convicted, pursuant to a jury verdict, of six counts of sexual assault with a minor under the age of fourteen, three counts of attempted sexual assault of a minor under the age of fourteen, and six counts of lewdness with a minor under the age of fourteen. (Exh. 26.)<sup>1</sup> The state district court sentenced petitioner to life in prison with a minimum of twenty years on each count of sexual assault, a term of twenty years with a minimum of five years for each count of attempted sexual assault, and a term of ten years with a minimum of four years on each count of lewdness. (Exh. 28.) The state district court ordered each sentence to be served concurrently. (*Id.*) The judgment of conviction was entered on May 23, 2006. (*Id.*)

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<sup>1</sup>The Exhs. referenced in this order are found in the Court's record at dkt. nos. 20-26.

1           Petitioner filed a notice of appeal from his judgment of conviction on June 29,  
2 2006. (Exh. 29.) By order filed August 10, 2006, the Nevada Supreme Court dismissed  
3 the appeal for lack of jurisdiction because the notice of appeal was untimely filed. (Exh.  
4 33.)

5           Subsequent to the entry of judgment and the dismissal of the appeal, the Nevada  
6 Department of Corrections apparently sent a letter to the state district court to inform the  
7 court that petitioner's judgment of conviction was missing a mandatory term of lifetime  
8 supervision. (Exh. 6, at p. 74.) As a result, the state district court entered an amended  
9 judgment of conviction on November 9, 2006, adding a mandatory term of lifetime  
10 supervision. (Exh. 35.) Petitioner took no appeal from the entry of the amended  
11 judgment of conviction.

12           On April 13, 2007, petitioner, who was represented by counsel Martin R. Boyers,  
13 filed a habeas petition and accompanying points and authorities with the state district  
14 court. (Exhs. 36 & 37.) Thereafter, the State conceded that petitioner was entitled to  
15 relief under *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). (Exh. 6, at p. 79.)  
16 ("Mr. Simon stated deft is entitled to *Lozada* hearing . . ."). The matter was briefed and  
17 petitioner's new counsel, Kristina Wildeveld, filed a supplemental habeas petition  
18 pursuant to *Lozada* on June 12, 2008. (Exh. 42.) After a hearing on the *Lozada* petition,  
19 the state district court denied relief. (Exh. 47.) Petitioner filed a timely notice of appeal  
20 with the assistance of counsel. (Exh. 48.) Petitioner's counsel filed an opening brief on  
21 March 26, 2009. (Exh. 53.) On June 23, 2010, the Nevada Supreme Court issued an  
22 order affirming the state district court's denial of the *Lozada* petition. (Exh. 57.)  
23 Remittitur issued on July 19, 2010. (Exh. 58.)

24           On June 28, 2011, petitioner, acting in *pro se*, filed a second habeas petition in  
25 the state district court. (Exh. 59.) The next day, petitioner filed a *pro se* supplemental  
26 petition. (Exh. 60.) The State filed a response to the petition and petitioner replied.  
27 (Exhs. 62 & 63.) Petitioner filed another *pro se* supplement to the petition on September  
28 13, 2011. (Exh. 65.) On October 5, 2011, the state district court denied the petition.

1 (Exh. 69.) With the exception of petitioner's claims that his attorney was ineffective for  
2 failing to raise various issues during the *Lozada* proceedings, the state district court  
3 found the second state habeas petition to be procedurally defaulted pursuant to NRS  
4 34.726 and 34.810. (*Id.*) The state district court also found that petitioner received  
5 effective assistance of counsel during the *Lozada* proceedings. (*Id.*) Petitioner  
6 appealed, acting in *pro se*. (Exh. 74.) Petitioner filed a *pro se* opening brief. (Exh. 80.)  
7 Although the Nevada Supreme Court considered petitioner's opening brief, the court  
8 determined that briefing was not necessary in the matter and issued an order affirming  
9 the state district court's findings without a response from the State. (Exh. 81.) Although  
10 the Nevada Supreme Court disagreed with the state district court's finding that the  
11 petition was untimely under NRS 34.726, the court determined that all other claims, with  
12 the exception of petitioner's claims that his *Lozada* attorney was ineffective, were  
13 procedurally defaulted under NRS 34.810 based on petitioner's failure to raise them in a  
14 prior proceeding, and petitioner failed to make an adequate showing to overcome the  
15 procedural default. (Exh. 81, at pp. 2-7.) Remittitur issued on October 9, 2012. (Exh.  
16 82.)

17 Petitioner's *pro se* federal habeas petition was dispatched to this Court on  
18 October 14, 2012. (Dkt. no. 1-2.) Petitioner filed a supplemental petition on December 3,  
19 2012. (Dkt. no. 8.) This Court granted petitioner's motion for the appointment of counsel,  
20 appointing the Office of the Federal Public Defender to represent petitioner in this  
21 proceeding. (Dkt. no. 7.) Petitioner, represented by counsel, filed an amended petition  
22 on September 9, 2013. (Dkt. no. 19.) Respondents have filed a motion to dismiss this  
23 action. (Dkt. no. 30.) Petitioner, through counsel, filed an opposition. (Dkt. no. 35.)  
24 Respondents filed a reply. (Dkt. no. 40.)

## 25 **II. DISCUSSION**

26 Respondents claim that the original petition, the supplemental petition, and the  
27 amended petition are untimely. The Antiterrorism and Effective Death Penalty Act  
28 (AEDPA) amended the statutes controlling federal habeas corpus practice to include a

1 one-year statute of limitations on the filing of federal habeas corpus petitions. With  
2 respect to the statute of limitations, the habeas corpus statute provides:

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

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

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

10 (C) the date on which the constitutional right asserted was initially  
11 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

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

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

17 28 U.S.C. § 2244(d).

18 In adopting the AEDPA, Congress imposed a one-year statute of limitations on  
19 the filing of a federal habeas petition. 28 U.S.C. § 2244(d)(1). Unless a claim is entitled  
20 to delayed accrual under 28 U.S.C. § 2244(d)(1)(B)-(D), the starting date for the AEDPA  
21 statute of limitations is based on the finality of the judgment of conviction under 28  
22 U.S.C. § 2244(d)(1)(A). *See Mardesich v. Cate*, 668 F.3d 1164, 1169-71 (9<sup>th</sup> Cir. 2012).  
23 When a petitioner does not pursue state appellate remedies, his conviction is  
24 considered final upon the expiration of time for him to pursue state remedies. *Gonzalez*  
25 *v. Thaler*, 132 S.Ct. 641, 647 (2012). Where a Nevada defendant does not pursue a  
26 direct appeal, his judgment is final under 28 U.S.C. § 2244(d)(1)(A) when the time for  
27 him to file a direct appeal expires under Nevada R. App. P. 4(b)(1)(A), which is thirty  
28 (30) days after the entry of the judgment of conviction.

1           Petitioner did not file a timely notice of appeal after the state district court entered  
2 the original judgment of conviction dated May 23, 2006. (Exh. 28; Exh. 33.) As a result,  
3 petitioner's conviction became final on June 22, 2006, when the time for petitioner to file  
4 a timely notice of appeal expired. Nev. R. App. P. 4(b)(1)(A). This gave petitioner until  
5 June 22, 2007, to file a timely federal petition. Petitioner filed his first state habeas  
6 petition on April 13, 2007, which was 295 days after petitioner's judgment of conviction  
7 became final under 28 U.S.C. § 2244(d)(1)(A) and thus tolling the AEDPA statute of  
8 limitations until remittitur issued in that proceeding. (Exh. 36.) With remittitur issuing on  
9 July 19, 2010, and 70 days of untolled days remaining, petitioner had until September  
10 27, 2010, to file a timely federal habeas petition. (Exh. 58.) However, petitioner did not  
11 dispatch his original *pro se* federal petition until October 14, 2012. (Dkt. no. 1-2.) The  
12 first page of the federal habeas petition indicates that the petition was dispatched (given  
13 to prison staff for mailing) to this Court on October 14, 2012. (Dkt. no. 1-2, at p. 1, item  
14 5.) This Court deems the petitioner's federal petition to be filed October 14, 2012. *See*  
15 *Houston v. Lack*, 487 U.S. 266, 270 (1988) (pursuant to the "mailbox rule," federal  
16 courts deem the filing date of a document as the date that it was given to prison officials  
17 for mailing). The federal petition was untimely filed on October 14, 2012. Under this  
18 analysis, the original federal habeas petition was untimely by 748 days.

19           Alternatively, if the Court bases the finality of petitioner's conviction on the entry  
20 of the amended judgment of conviction, the original federal habeas petition is still  
21 untimely. The state district court entered an amended judgment of conviction on  
22 November 9, 2006. (Exh. 35.) Petitioner filed no notice of appeal following the entry of  
23 the amended judgment of conviction, therefore, the amended judgment of conviction  
24 became final on December 9, 2006. This gave petitioner until December 9, 2007, in  
25 which to file a timely federal petition. Petitioner filed his first state habeas petition on  
26 April 13, 2007, which was 125 days after the finality of the amended judgment of  
27 conviction under 28 U.S.C. § 2244(d)(1)(A), thus tolling the AEDPA statute of limitations  
28 until remittitur issued in that proceeding. (Exh. 36.) With remittitur issuing on July 19,

1 2010, and 245 days of untolled time remaining, petitioner had until March 21, 2011, to  
2 file a timely federal habeas petition. (Exh. 58.) Petitioner did not file his original federal  
3 habeas petition until October 14, 2012. (Dkt. no. 1-2.) Under this analysis, the original  
4 federal habeas petition was untimely by 573 days.

5 Under either of the two scenarios above, the Court notes that petitioner did not  
6 file his second state habeas petition until June 28, 2011, which was after the expiration  
7 of the AEDPA's statute of limitations in this case. (Exh. 59.) An application for state  
8 post-conviction relief does not toll the AEDPA statute of limitations where the petitioner  
9 files it after the AEDPA statute of limitations has expired. *Ferguson v. Palmateer*, 321  
10 F.3d 820, 823 (9<sup>th</sup> Cir. 2003); *Jimenez v. Rice*, 276 F.3d 478, 482 (9<sup>th</sup> Cir. 2001). The  
11 second state habeas petition did not toll the AEDPA statute of limitations during its  
12 pendency.

13 In his opposition, petitioner argues that the finality of his judgment of conviction  
14 should be based on the expiration of time for seeking certiorari review from his first state  
15 habeas appeal pursuant to *Jimenez v. Quarterman*, 531 U.S. 113 (2009), because the  
16 Nevada courts permitted petitioner to pursue direct appeal claims through a *Lozada*  
17 petition. (Dkt. no. 35, at pp. 6-17.) Petitioner argues that the AEDPA one-year statute of  
18 limitations should have begun to run on September 21, 2010, which was ninety (90)  
19 days after the Nevada Supreme Court's order affirming the denial of the *Lozada*  
20 petition. Petitioner asserts that petitioner's second state habeas petition was "properly  
21 filed" and therefore petitioner is entitled to statutory tolling during the pendency of the  
22 second state habeas petition pursuant to 28 U.S.C. § 2244(d)(2). Petitioner asserts that  
23 the AEDPA statute of limitations was statutorily tolled from June 28, 2011, through  
24 October 9, 2012, the date that remittitur issued on the appeal from the denial of the  
25 second state habeas petition. Petitioner argues that when petitioner dispatched his  
26 federal petition to this Court on October 14, 2012, he had only used 283 days of the  
27 one-year AEDPA statute of limitations, making his original federal petition timely.

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1 In *Lozada v. State*, the Nevada Supreme Court held that it did not have  
2 jurisdiction to conduct a delayed appeal because a procedural mechanism for such a  
3 proceeding did not exist under Nevada law. *Lozada*, 871 P.3d at 946.<sup>2</sup> The Nevada  
4 Supreme Court held that if a petitioner could establish meritorious claim that counsel  
5 was ineffective for failing to file a timely notice of appeal, he would be allowed to raise in  
6 a state habeas petition any issues which he could have raised on direct appeal. *Id.* at  
7 950.

8 In *Jimenez v. Quarterman*, 555 U.S. 113, 119-121 (2009), the Supreme Court  
9 concluded that, if a state court restores a defendant's appellate rights by restoring the  
10 pendency of an untimely direct appeal, the AEDPA's one-year statute of limitations does  
11 not begin to run under 28 U.S.C. § 2244(d)(1)(A) until the conclusion of the out-of-time  
12 direct appeal, which includes the expiration of time for seeking certiorari review of that  
13 appeal. Petitioner asserts that his *Lozada* petition is the same as, or the functional  
14 equivalent of, a re-opened direct appeal. Petitioner asserts that because he availed  
15 himself of the *Lozada* remedy, which he asserts is the same as a direct appeal, the one-  
16 year AEDPA statute of limitations should not begin to run until the conclusion of the  
17 *Lozada* proceedings.

18 In *Randle v. Crawford*, 604 F.3d 1047 (9<sup>th</sup> Cir. 2010), *cert. denied*, *Randle v.*  
19 *Skolnik*, 131 S.Ct. 474 (2010), the Ninth Circuit rejected the same argument that  
20 petitioner asserts in the instant case. In *Randle v. Crawford*, a Nevada petitioner argued  
21 that his *Lozada* proceeding altered the date of finality of his conviction under 28 U.S.C.  
22 § 2244(d)(1)(A), citing to *Jimenez*, because the *Lozada* procedure "is equivalent to a  
23 decision on an out-of-time direct appeal." *Randle*, 604 F.3d at 1056. The Ninth Circuit  
24 rejected the petitioner's argument, as follows:

25 [U]nlike *Jimenez*, the Nevada Supreme Court never granted Randle leave  
26 to file an out-of-time direct appeal. Rather, the state supreme court

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27 <sup>2</sup>In 2009, the Nevada Supreme Court amended the Nevada Rules of Appellate  
28 Procedure to allow an out-of-time appeal from a judgment of conviction where there has  
been ineffective assistance of counsel. See Nev. R. App. P. 4(c).

1 explicitly stated that an untimely direct appeal was foreclosed by state  
2 rules, and that “[a]n untimely notice of appeal failed to vest jurisdiction in  
3 this court.” At no point did the Nevada Supreme Court “restor[e] the  
4 pendency of the direct appeal,” nor was “petitioner’s conviction . . . again  
capable of modification through direct appeal to the state courts and to  
[the Supreme Court] on certiorari review.” *Jimenez*, 129 S.Ct. at 686.

5 *Randle*, 604 F.3d 1056-57 (internal citations omitted). The Ninth Circuit further noted  
6 that “[a]lthough *Randle* was entitled to present, pursuant to *Lozada*, the arguments that  
7 he would have presented on direct appeal in his state postconviction relief proceeding,  
8 *his direct appeal was not, and could not be, reinstated.*” *Id.* at 1057 (emphasis added).  
9 The Ninth Circuit concluded that *Jimenez* did not apply to *Lozada* proceedings in  
10 Nevada state courts. *Id.* Similarly, in the instant case, although the Nevada state courts  
11 allowed petitioner to present direct appeal arguments in a *Lozada* petition, petitioner  
12 fails to establish that the Nevada courts restored the pendency of his direct appeal, a  
13 condition that the Ninth Circuit in *Randle* recognized could not happen in light of the  
14 Nevada Supreme Court’s holding in *Lozada*, thus distinguishing Nevada’s *Lozada*  
15 procedure from restoration of the pendency of a direct appeal, as occurred in *Jimenez*.  
16 The Court rejects petitioner’s assertion that this Court need not follow the Ninth Circuit’s  
17 binding authority announced in the *Randle v. Crawford* decision.

18 Petitioner also asserts that respondents should be judicially estopped from  
19 arguing that the *Lozada* proceeding did not result in a reopening of petitioner’s criminal  
20 proceedings for purposes of permitting a delayed direct appeal that alters the finality  
21 date of petitioner’s judgment of conviction. (Dkt. no. 35, at pp. 8-9; pp. 15-16.) In  
22 determining whether to apply judicial estoppel, the Court considers: (1) whether a  
23 party’s position in the later judicial proceeding is clearly inconsistent with the party’s  
24 earlier position; (2) whether the party persuaded the first court to accept the earlier  
25 position, so that judicial acceptance of an inconsistent position in a later proceeding  
26 would create the perception that one of the two courts was misled; and (3) whether the  
27 party seeking to assert an inconsistent position would derive an unfair advantage or  
28 impose an unfair detriment on the opposing party if not estopped. *Randle v. Crawford*,

1 604 F.3d at 1053-54 (*citing Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782-  
2 83 (9<sup>th</sup> Cir. 2001)). Petitioner has failed to identify a clearly inconsistent position that  
3 respondents took regarding the finality of his conviction under 28 U.S.C. §  
4 2244(d)(1)(A). Petitioner's arguments regarding judicial estoppel lack merit and are  
5 rejected by this Court.

6 Petitioner asserts that the *Lozada* remedy was a state-created impediment to his  
7 filing of a timely federal habeas petition. (Dkt. no. 35, at pp. 17-19.) Where the  
8 government created an impediment to the filing of a federal habeas petition in violation  
9 of the Constitution or laws of the United States, the statute of limitations begins to run  
10 on the date that such impediment is removed. 28 U.S.C. § 2244(d)(1)(B). In order for  
11 28 U.S.C. § 2244(d)(1)(B) to be applicable, the government's action must have  
12 prevented petitioner from filing a federal habeas petition on time. *See Whalem/Hunt v.*  
13 *Early*, 233 F.3d 1146, 1148 (9<sup>th</sup> Cir. 2000) (petitioner may be able to show that  
14 government created an impediment to filing federal habeas petition within the meaning  
15 of 28 U.S.C. § 2244(d)(1)(B) where prison law library did not contain any legal materials  
16 regarding the AEDPA); *see also Randle v. Crawford*, 604 F.3d at 1057 (petitioner failed  
17 to establish a nexus between counsel's failure to file a notice of appeal and petitioner's  
18 failure to file a timely federal habeas petition).

19 In the instant case, petitioner asserts that by allowing petitioner to file a *Lozada*  
20 petition and "by refusing to reinstate a defendant's appeal after a Sixth Amendment  
21 violation, the Nevada Supreme Court has impeded Johnston from getting the full one-  
22 year statute of limitations." (Dkt. no. 35, at pp. 17-18.) Petitioner fails to identify a state  
23 action that prevented him from filing a timely federal petition. To the extent that  
24 petitioner asserts that he was not given a full year from the finality of his conviction to  
25 file his federal habeas petition under the AEDPA, the Court rejects this argument.  
26 Petitioner's judgment of conviction was filed on May 23, 2006, and his amended  
27 judgment of conviction was filed on November 9, 2006. (Exhs. 28 & 35.) Petitioner filed  
28 a pleading in the Nevada Supreme Court acknowledging that his notice of appeal was

1 untimely filed on July 6, 2006, and requesting that the Nevada Supreme Court permit  
2 his appeal to proceed despite the untimely filing of the notice of appeal. (Exh. 31.) The  
3 Nevada Supreme Court denied that request and dismissed petitioner’s direct appeal by  
4 order filed August 10, 2006, citing *Lozada* for the proposition that the Court was without  
5 jurisdiction to entertain the appeal due to the untimely notice of appeal. (Exh. 33.) The  
6 Nevada Supreme Court’s order informed petitioner that the appropriate vehicle for  
7 alleging counsel’s failure to file a timely notice of appeal was the filing of a state habeas  
8 petition alleging a claim of ineffective assistance of counsel. (*Id.*) Petitioner then waited  
9 until April 13, 2007, to file his first state habeas petition. (Exh. 36.) The first state habeas  
10 petition included a claim alleging that counsel was ineffective for failing to file a timely  
11 notice of appeal — this started petitioner’s *Lozada* proceeding in state court. (Exh. 36).  
12 Petitioner provides this Court with no explanation for why it took him eight (8) months  
13 after the Nevada Supreme Court’s order of August 10, 2006, to file his first state habeas  
14 petition pursuant to *Lozada*. Petitioner’s first state petition and appeal (his *Lozada*  
15 proceeding) concluded on July 19, 2010, the date that the Nevada Supreme Court  
16 issued remittitur from the denial of petitioner’s appeal. (Exhs. 57 & 58.) Petitioner then  
17 waited an additional eleven (11) months to file his second state habeas petition on June  
18 29, 2011. (Exh. 59.) Petitioner provides no explanation for the eleven-month delay in  
19 filing the second state habeas petition after the issuance of remittitur on July 19, 2010.  
20 More importantly, petitioner provides no explanation for his failure to file a timely federal  
21 habeas petition at any point within that time period. Petitioner fails to establish a causal  
22 nexus between the *Lozada* remedy afforded by the Nevada state courts and his ability  
23 to file a timely federal petition. The Nevada state courts did not impede petitioner’s  
24 ability to file a timely federal petition, thus 28 U.S.C. § 2244(d)(1)(B) has no application  
25 to this case.

26         Petitioner further asserts that the “State led Johnston to believe that this  
27 impediment was not present” because the State took the position “that the *Lozada*  
28 remedy was the same as a direct appeal.” (Dkt. no. 35, at p. 18.) Review of

1 respondents' filings in state district court shows that the State expressly asserted that  
2 the state district court did not award petitioner a delayed direct appeal in allowing the  
3 *Lozada* petition to proceed. (See, e.g., Exh. 43, at pp. 4-5.) Petitioner fails to point to  
4 any representation made by the State in the state court record showing that the State  
5 made any representation about what impact the *Lozada* proceeding would have on the  
6 finality of petitioner's conviction and on the AEDPA deadline in which to file a federal  
7 habeas petition. Because there was no state-created impediment to the filing of a timely  
8 federal habeas petition, the provision in 28 U.S.C. § 2244(d)(1)(B) is not applicable to  
9 this case.

10 Finally, petitioner asserts that he is entitled to equitable tolling on the basis of  
11 attorney misconduct in failing to file a timely notice of appeal following his judgment of  
12 conviction. Petitioner also asserts that State actors led him to believe that the AEDPA  
13 time period did not begin to run until review of the *Lozada* petition had been completed.  
14 (Dkt. no. 35, at pp. 19-22.)

15 The United States Supreme Court has held that the AEDPA's statute of  
16 limitations "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560  
17 U.S. 631, 645 (2010). The Supreme Court held that "a petitioner is entitled to equitable  
18 tolling only if he shows: (1) that he has been pursuing his rights diligently, and (2) that  
19 some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*,  
20 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The petitioner  
21 bears the burden of demonstrating that he is entitled to equitable tolling. *Espinoza-*  
22 *Matthews v. California*, 432 F.3d 1021, 1026 (9<sup>th</sup> Cir. 2005). "[A] petitioner must show  
23 that his untimeliness was caused by an external impediment and not by his own lack of  
24 diligence." *Bryant v. Arizona Att. Gen.*, 499 F.3d 1056, 1061 (9<sup>th</sup> Cir. 2007). A petitioner  
25 "must show that some 'external force' caused his untimeliness, rather than mere  
26 'oversight, miscalculation or negligence.'" *Velasquez v. Kirkland*, 639 F.3d 964, 969 (9<sup>th</sup>  
27 Cir. 2011) (quoting *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9<sup>th</sup> Cir. 2009)).  
28 "[A] garden variety claim of excusable neglect . . . such as a simple miscalculation that

1 leads a lawyer to miss a filing deadline . . . does not warrant equitable tolling.” *Holland*,  
2 560 U.S. at 651-52 (internal quotations and citations omitted). A *pro se* petitioner’s lack  
3 of legal knowledge or sophistication is not, by itself, an extraordinary circumstance  
4 warranting tolling. *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9<sup>th</sup> Cir. 2006). A petitioner  
5 is not entitled to equitable tolling where the cause of his late filing is incorrect advice  
6 from counsel. *Frye v. Hickman*, 273 F.3d 1144 (9<sup>th</sup> Cir. 2001).

7 In this case, petitioner asserts that he is entitled to equitable tolling based on his  
8 attorney’s failure to file a timely notice of appeal from this judgment of conviction.  
9 Similarly, in *Randle v. Crawford*, the petitioner sought equitable tolling because his  
10 counsel failed to perfect a timely appeal in state court. 604 F.3d at 1057-58. The Ninth  
11 Circuit in *Randle* held that petitioner was not entitled to equitable tolling, as follows:

12 [T]he alleged negligence of Randle’s counsel had little to no bearing on his  
13 ability to file a timely federal habeas petition. Counsel’s failure to perfect  
14 an appeal simply meant that Randle had one year from the expiration of  
his time to file a notice of appeal in which to initiate a federal habeas  
action — it did not prevent him from filing the petition.

15 *Randle*, 604 F.3d at 1058. Here, just as in *Randle*, petitioner’s attorney’s failure to file a  
16 timely notice of appeal in state court was not an “extraordinary circumstance” that  
17 prevented petitioner from filing a timely federal habeas petition. The Court further rejects  
18 petitioner’s assertion that State actors led him to believe that the AEDPA time period did  
19 not begin to run until review of the *Lozada* petition had been completed, as discussed  
20 earlier in this order. Petitioner has not established that the State informed him that his  
21 *Lozada* proceedings would alter the date of finality for purposes of filing a timely federal  
22 habeas petition. Petitioner has not demonstrated an extraordinary circumstance that  
23 prevented him from filing a timely federal habeas petition, and therefore, petitioner is not  
24 entitled to equitable tolling.

25 Additionally, if even petitioner could have established that an extraordinary  
26 circumstance prevented him from filing a timely federal habeas petition, petitioner’s  
27 claim for equitable tolling fails because he has not established that he acted with  
28 reasonable diligence in pursuing this federal petition. As discussed *supra*, petitioner

1 provides no explanation for the eight month delay between the dismissal of his direct  
2 appeal for lack of jurisdiction and the filing of his first state habeas (*Lozada*) petition.  
3 Petitioner also provides no explanation for the eleven month delay between the  
4 resolution of his *Lozada* proceedings on appeal and the filing of his second state  
5 habeas petition. (See Exhs. 33, 36, 58, 59.) Significantly, petitioner has failed to  
6 establish that he acted with reasonable diligence in pursuing and filing a timely federal  
7 habeas petition. In sum, petitioner has failed to establish an extraordinary circumstance  
8 that prevented him from filing a timely federal habeas petition and petitioner has failed  
9 to establish that he acted with reasonable diligence in pursuing timely federal habeas  
10 relief. Petitioner is not entitled to equitable tolling. This action must be dismissed with  
11 prejudice as untimely, because the original petition was untimely. Given this finding, the  
12 Court need not reach the issue of whether the amended petition relates back to the  
13 original petition.

### 14 **III. CERTIFICATE OF APPEALABILITY**

15 District courts are required to rule on the certificate of appealability in the order  
16 disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a  
17 notice of appeal and request for certificate of appealability to be filed. Rule 11(a), Rules  
18 Governing Section 2254 Cases in the United States District Courts. In order to proceed  
19 with his appeal, petitioner must receive a certificate of appealability. 28 U.S.C. §  
20 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951  
21 (9<sup>th</sup> Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001).  
22 Generally, a petitioner must make “a substantial showing of the denial of a constitutional  
23 right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v.*  
24 *McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that  
25 reasonable jurists would find the district court’s assessment of the constitutional claims  
26 debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold  
27 inquiry, the petitioner has the burden of demonstrating that the issues are debatable  
28 among jurists of reason; that a court could resolve the issues differently; or that the

1 questions are adequate to deserve encouragement to proceed further. *Id.* In this case,  
2 no reasonable jurist would find this Court's dismissal of the petition as untimely  
3 debatable or wrong. The Court therefore denies petitioner a certificate of appealability.

4 **IV. CONCLUSION**

5 It is therefore ordered that respondents' motion to dismiss (dkt. no. 30) is  
6 granted.

7 It is further ordered that this action is dismissed with prejudice as untimely.

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

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

10 DATED THIS 15<sup>th</sup> day of December 2014.  
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14 MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE

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