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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JOSE MANUEL GARCIA-GAONA,

v.
HAROLD WICKHAM, et al.,

Respondents.

Case No. 3:17-cv-00360-MMD-WGC

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on Respondents' motion to dismiss Petitioner Jose Manuel Garcia-Gaona's pro se petition as untimely (ECF No. 10). Petitioner did not file an opposition or otherwise respond to the motion to dismiss. As discussed below, the Court will dismiss the petition as untimely.

I. BACKGROUND

A jury convicted Garcia-Gaona of three counts of trafficking in a schedule 1 controlled substance. (ECF Nos. 13-6, 13-7, 13-8 (Exhs. 77-79).) The state district court sentenced him to 10 to 25 years on count 1; 12 to 34 months on count 2; and 12 to 34 months on count 3, all to run concurrently. (ECF No. 13-11 (Exh. 82).) Judgment of conviction was entered on May 7, 2013. (Id.)

The Nevada Supreme Court affirmed the convictions on direct review, and the Nevada Court of Appeals affirmed the denial of Garcia-Gaona's state postconviction habeas corpus petition. (ECF Nos. 13-33, 14-35 (Exhs. 104, 140).)

Garcia-Gaona dispatched his federal habeas petition for mailing on or about May 23, 2017. (ECF No. 7.) Respondents have moved to dismiss the petition as time-barred. (ECF No. 10.)

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1 **II. LEGAL STANDARD**

2 The Antiterrorism and Effective Death Penalty Act (“AEDPA”) went into effect on
3 April 24, 1996 and imposes a one-year statute of limitations on the filing of federal habeas
4 corpus petitions. See 28 U.S.C. § 2244(d). The one-year time limitation can run from the
5 date on which a petitioner’s judgment became final by conclusion of direct review, or the
6 expiration of the time for seeking direct review. See 28 U.S.C. § 2244(d)(1)(A). Further,
7 a properly filed petition for state postconviction relief can toll the period of limitations. See
8 28 U.S.C. § 2244(d)(2).

9 A petitioner may be entitled to equitable tolling if he can show “(1) that he has
10 been pursuing his right diligently, and that (2) some extraordinary circumstance stood in
11 his way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2009) (quoting
12 prior authority). Equitable tolling is “unavailable in most cases,” *Miles v. Prunty*, 187 F.3d
13 1104, 1107 (9th Cir. 1999), and “the threshold necessary to trigger equitable tolling is very
14 high, lest the exceptions swallow the rule” *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th
15 Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)). The
16 petitioner ultimately has the burden of proof on this “extraordinary exclusion.” 292 F.3d at
17 1065. He accordingly must demonstrate a causal relationship between the extraordinary
18 circumstance and the lateness of his filing. See, e.g., *Spitsyn v. Moore*, 345 F.3d 796,
19 799 (9th Cir. 2003).

20 Ignorance of the one-year statute of limitations does not constitute an extraordinary
21 circumstance that prevents a prisoner from making a timely filing. See *Raspberry v. Garcia*,
22 448 F.3d 1150, 1154 (9th Cir. 2006) (“a pro se petitioner’s lack of legal sophistication is
23 not, by itself, an extraordinary circumstance warranting equitable tolling”).

24 **III. DISCUSSION**

25 Here, Petitioner timely appealed his convictions. (ECF No. 13-12 (Exh. 83).) The
26 Nevada Supreme Court affirmed the convictions on March 12, 2014, and remittitur issued
27 on April 9, 2014. (ECF Nos. 13-33, 13-34 (Exhs. 104, 105).) He filed a state postconviction
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1 petition on April 18, 2014. (ECF No. 14-4 (Exh. 110).) The state district court denied the
2 postconviction petition on the merits on April 17, 2015. (ECF No. 14-22 (Exh. 127).) On
3 March 16, 2016, the Nevada Court of Appeals affirmed the denial of the postconviction
4 petition, and remittitur issued on April 11, 2016. (ECF No. 14-36 (Exh. 141).)

5 The one-year AEDPA limitation period began to run on April 12, 2016, and it
6 expired on April 12, 2017. See 28 U.S.C. § 2244(d)(2); *Carey v. Saffold*, 536 U.S. 214,
7 220 (2002). Petitioner dispatched his federal habeas petition for filing on or about May
8 23, 2017. (ECF No. 7 at 1.) Thus, about 406 days of untolled time passed between the
9 conclusion of Petitioner’s state-court proceedings and the date that he filed his federal
10 habeas petition. The federal petition, therefore, is untimely. Petitioner has not opposed
11 the motion to dismiss the petition as untimely or responded to the motion in any way.
12 Accordingly, Respondents’ motion to dismiss the petition as time-barred is granted. This
13 petition is dismissed with prejudice.

14 **IV. CERTIFICATE OF APPEALABILITY**

15 This is a final order adverse to the Petitioner. As such, Rule 11 of the Rules
16 Governing Section 2254 Cases requires this Court to issue or deny a certificate of
17 appealability (“COA”). Accordingly, the court has sua sponte evaluated the claims within
18 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*
19 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

20 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner
21 “has made a substantial showing of the denial of a constitutional right.” With respect to
22 claims rejected on the merits, a Petitioner “must demonstrate that reasonable jurists
23 would find the district court’s assessment of the constitutional claims debatable or wrong.”
24 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted). For procedural rulings, a
25 COA will issue only if reasonable jurists could debate: (1) whether the petition states a
26 valid claim of the denial of a constitutional right; and (2) whether the court’s procedural
27 ruling was correct. See *id.*

1 The Court finds that Petitioner cannot satisfy the Slack standard. The Court
2 therefore declines to issue a certificate of appealability.

3 **V. CONCLUSION**

4 It is therefore ordered that Respondents' motion to dismiss the petition (ECF No.
5 10) is granted as set forth in this order. The petition is dismissed with prejudice.


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

7 It is further ordered that the Clerk shall enter judgment accordingly and close this
8 case.

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10 DATED THIS 18th day of December 2018.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

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