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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOHNNY EDWARD MCMAHON,

Petitioner,

v.

ISIDRO BACA, *et al.*,

Respondents.

Case No. 3:18-cv-00002-MMD-WGC

ORDER

Petitioner has filed a habeas petition under 28 U.S.C. § 2254 without properly commencing the action by paying the filing fee or filing a pauper application.

It does not appear that a dismissal without prejudice would materially impact the analysis of either a substantial successive petition issue and/or the application of the limitation period in a promptly filed new action or otherwise cause substantial prejudice.¹

¹By petitioner's own admission, this is a second or successive petition. Petitioner previously challenged his custody under the same judgment of conviction (state Case No. 06-220825) in this Court in Case No. 2:12-cv-00774-MMD-CWH and Case No. 2:14-cv-00076-APG-CHW. While No. 2:12-cv-00774-MMD-CWH was dismissed on procedural grounds, No. 2:14-cv-00076-APG-CWH was denied on the merits on September 29, 2017. Petitioner's appeal of that decision is currently pending. Additionally, petitioner has filed an application with the Ninth Circuit for permission to file a second or successive petition, which also remains pending. Review of online judicial dockets reflects that there have been no intervening amended or corrected judgments of conviction in the state district court. Because the Ninth Circuit has not granted petitioner leave to file a second or successive petition at this time, litigation of the successive petition issue in this case will not be materially impacted by a dismissal of the current action without prejudice.

With regard to timeliness, the conviction petitioner challenges was affirmed on direct appeal on October 16, 2009, and the time to file a certiorari petition expired on January 14, 2010. Thereafter, petitioner filed a timely state petition on May 21, 2010. One hundred and twenty-six (126) days elapsed between the date petitioner's judgment became final and the date he filed his first state postconviction petition. Proceedings on the first petition remained pending through issuance of the remittitur on July 10, 2013, and the limitations period was tolled during the pendency of the first petition. Although
(*fn. cont...*)

1 This improperly commenced action therefore will be dismissed without prejudice.

2 It is therefore ordered that this action is dismissed without prejudice.


3 It is further ordered that a certificate of appealability is denied. Jurists of reason
4 would not find debatable whether the Court was correct in its dismissal of the action
5 without prejudice on procedural grounds, for the reasons discussed herein.

6 It is further ordered, pursuant to Rule 4 of the Rules Governing Section 2254
7 Cases, that the Clerk make informal electronic service upon respondents by adding
8 Nevada Attorney General Adam P. Laxalt as counsel for respondents and directing a
9 notice of electronic filing of this order to his office. No response is required from
10 respondents other than to respond to any orders of a reviewing court.

11 It is further ordered that the Clerk of Court send petitioner a copy of his papers in
12 this action, along with copies of the forms and instructions for an inmate pauper
13 application and habeas petition.

14 It is further ordered that the Clerk of Court enter final judgment accordingly,
15 dismissing this action without prejudice.

16 DATED THIS 5th day of January 2018.

17 
18 _____
19 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

20 (*...fn. cont.*)
21 petitioner filed a second state postconviction petition before the clock began to run
22 again, the Nevada Supreme Court affirmed denial of the petition on the grounds that it
23 was, among other things, untimely. The second petition therefore did not toll the
24 limitations period. Nor did petitioner's federal habeas petition, which has been
25 constructively pending since January 10, 2014, toll the limitations period. Petitioner also
26 filed numerous other postconviction motions in state court before the expiration of the
27 limitations period. However, even assuming any of those could be considered properly
28 filed applications for collateral review, those motions have been finally resolved since no
later than October 15, 2014, when remittitur issued on the Nevada Supreme Court's
denial or dismissal of the appeal on those motions. Thus, absent other tolling or delayed
accrual, the federal limitation period expired at the absolute latest on June 11, 2015.
See 28 U.S.C. § 2244(d). Accordingly, litigation in a promptly filed new action of the
timeliness issue presented by the foregoing writ history would not be materially
impacted by a dismissal without prejudice of the present action, and that timeliness
issue would be reached only if petitioner overcame the substantial successive petition
issue that would be presented in the first instance.