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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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DAMIAN MICHAEL GONZALES,  
  
Petitioner,  
  
v.  
  
RENEE BAKER, WARDEN, *et al.*,  
  
Respondents.

Case No. 3:18-cv-00058-MMD-CLB  
  
ORDER

**I. SUMMARY**

This is a counseled habeas corpus action under 28 U.S.C. § 2254. Currently before the Court are the first amended petition of Petitioner Damian Michael Gonzales (ECF No. 21), Respondents' motion to dismiss (ECF No. 27), Petitioner's opposition (ECF No. 38), and Respondents' reply (ECF No. 44). The petition is untimely, which Gonzales acknowledges. Gonzales has not demonstrated that an evidentiary hearing is warranted in this action, and he has not demonstrated that he is entitled to equitable tolling. The Court therefore grants the motion to dismiss.

**II. BACKGROUND**

After a jury trial, on January 27, 2011, the state district court convicted Gonzales of 11 counts of sexual assault with a minor under 14 years of age, six counts of lewdness with a child under the age of 14, and two counts of child abuse and neglect.<sup>1</sup> (ECF No. 29-35 (Exh. 39).) Gonzales appealed. On June 14, 2012, the Nevada Supreme Court affirmed the judgment of conviction. (ECF No. 29-56 (Exh. 60).) Remittitur issued on July 10, 2012. (ECF No. 30-1 (Exh. 61).)

On September 6, 2012, Gonzales filed a motion for order to show cause, asking the state district court to order his attorney to turn over the case file to him. (ECF No. 30-

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<sup>1</sup> The jury also found Gonzales guilty of 2 counts of incest, but the state district court dismissed those counts.

1 2 (Exh. 62.) On September 27, 2012, the state district court orally granted the motion and  
2 directed counsel to send Gonzales a copy of his file and send the court verification of  
3 compliance within a week. (ECF No. 28-1 at 20 (Exh. 1).) A certificate of mailing indicates  
4 that counsel mailed Gonzales the file on September 28, 2012. *Id.* (ECF No. 28-1 at 34).  
5 The state district court issued a written order granting Gonzales' motion on October 22,  
6 2012. (ECF No. 30-3 (Exh. 63).)

7 Gonzales filed a post-conviction habeas corpus petition in the state district court on  
8 April 20, 2015. (ECF No. 30-4 (Ex. 64).) The state district court, upon Gonzales' motion,  
9 appointed counsel. Gonzales filed a counseled supplement to his petition on October 1,  
10 2015. (ECF No. 30-13 (Ex. 73).) The state district court denied the petition because it was  
11 untimely under NRS § 34.726(1), which requires a person to file a post-conviction habeas  
12 corpus petition within one year of the issuance of the remittitur on direct appeal. (ECF No.  
13 30-17 (Exh. 77).) Gonzales appealed. The Nevada Supreme Court transferred the case  
14 to the Nevada Court of Appeals. (ECF No. 30-28 (Exh. 88).) On December 28, 2016, the  
15 Nevada Court of Appeals affirmed. (ECF No. 30-29 (Exh. 89).) Remittitur issued on  
16 January 24, 2017. (ECF No. 30-30 (Exh. 90).)

17 On May 19, 2015, Gonzales filed a proper-person motion to correct an illegal  
18 sentence. (ECF No. 30-9 (Exh. 69).) The state district court denied the motion on August  
19 9, 2015. (ECF No. 30-12 (Exh. 72).) Gonzales did not appeal the denial.

20 On January 22, 2018, Gonzales dispatched his initial, proper person, § 2254  
21 petition to this Court. (ECF No. 9 at 1.) The Court appointed the Federal Public Defender  
22 to represent him. (ECF No. 8.) Gonzales filed a counseled first amended petition on May  
23 31, 2019. (ECF No. 21.)

### 24 **III. LEGAL STANDARD**

25 Congress has limited the time in which a person can petition for a writ of habeas  
26 corpus pursuant to 28 U.S.C. § 2254:

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

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

2 (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  
3 removed, if the applicant was prevented from filing by such State action;

4 (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  
5 review; or

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

8 28 U.S.C. § 2244(d)(1). If the judgment is appealed, then it becomes final when the  
9 Supreme Court of the United States denies a petition for a writ of certiorari or when the  
10 time to petition for a writ of certiorari expires. *Jimenez v. Quarterman*, 555 U.S. 113, 119-  
11 20 (2009). See also Sup. Ct. R. 13(1).

12 Any time spent pursuing a properly filed application for state post-conviction review  
13 or other collateral review does not count toward this one-year limitation period. 28 U.S.C.  
14 § 2244(d)(2). The period of limitation resumes when the post-conviction judgment  
15 becomes final upon issuance of the remittitur. *Jefferson v. Budge*, 419 F.3d 1013, 1015  
16 n.2 (9th Cir. 2005). An untimely state post-conviction petition is not “properly filed” and  
17 does not toll the period of limitation. *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005).

18 Section 2244(d) is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645  
19 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he has been  
20 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his  
21 way’ and prevented timely filing.” *Id.* at 649 (quoting *Pace*, 544 U.S. at 418). “First, for a  
22 litigant to demonstrate ‘he has been pursuing his rights diligently,’ *Holland*, 560 U.S. at  
23 649 [ . . . ], and thus satisfies the first element required for equitable tolling, he must show  
24 that he has been reasonably diligent in pursuing his rights not only while an impediment  
25 to filing caused by an extraordinary circumstance existed, but before and after as well, up  
26 to the time of filing his claim in federal court.” *Smith v. Davis*, 953 F.3d 582, 598–99. “[I]t  
27 is not enough for a petitioner seeking an exercise of equitable tolling to attempt diligently  
28 to remedy his extraordinary circumstances; when free from the extraordinary

1 circumstance, he must also be diligent in actively pursuing his rights.” *Id.* at 599. “Second,  
2 and relatedly, it is only when an extraordinary circumstance prevented a petitioner acting  
3 with reasonable diligence from making a timely filing that equitable tolling may be the  
4 proper remedy.” *Id.*

5 The petitioner effectively files a federal petition when he delivers it to prison officials  
6 to be forwarded to the clerk of the court. Rule 3(d), Rules Governing Section 2254 Cases  
7 in the United States District Courts.

#### 8 **IV. DISCUSSION**

##### 9 **A. The Petition is Untimely**

10 Gonzales acknowledges the untimeliness of the petition. (ECF No. 38 at 3–4.) The  
11 Nevada Supreme Court decided his direct appeal on June 14, 2012. The time to petition  
12 for a writ of certiorari expired on September 12, 2012. The federal one-year period started  
13 the next day. Gonzales had no post-conviction or other collateral review petition pending  
14 in the state courts over the next year. The one-year period thus expired at the end of  
15 September 12, 2013.

16 Gonzales filed his state post-conviction habeas corpus petition and his motion to  
17 correct an illegal sentence after the expiration of the one-year period. These two  
18 proceedings do not toll the one-year period because no time was left to be tolled. *Ferguson*  
19 *v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

20 Additionally, the state post-conviction habeas corpus petition was untimely under  
21 state law. It did not qualify for tolling the one-year period. *Pace*, 544 U.S. at 417.

##### 22 **B. Equitable Tolling is Not Warranted**

23 Gonzales asks the Court to conduct an evidentiary hearing to show that he is  
24 entitled to equitable tolling. However, he has not alleged any facts that the Court would  
25 need to determine by holding an evidentiary hearing. Furthermore, the record before the  
26 Court establishes that Gonzales is not entitled to equitable tolling.

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1                   **1. Gonzales Has Not Demonstrated Diligence**

2                   As noted above, Gonzales needs to demonstrate diligence before, during, and after  
3 any extraordinary circumstance that prevented timely filing. *Smith*, 953 F.3d at 598–99.  
4 On June 18, 2012, right after the Nevada Supreme Court decided his direct appeal, he  
5 sent counsel a letter asking for his file. (ECF No. 30-2 at 4 (Exh. 62).) On August 9, 2012,  
6 he sent counsel another letter. (*Id.* at 5.) Then, on September 6, 2012, he filed a motion  
7 in the state district court asking that court to order counsel to send him a file. *Id.* Gonzales  
8 referred to the state and federal statutes of limitations in both letters and in the motion. On  
9 September 27, 2012, two weeks after the federal one-year period commenced, the state  
10 district court orally granted the motion. (ECF No. 28-1 at 20 (Exh. 1).) On September 28,  
11 2012, counsel mailed Gonzales his file. (*Id.* at 34.) Nobody could doubt that Gonzales  
12 acted diligently during that time, but that is not enough.

13                   Then Gonzales did nothing for two and a half years, until he filed his state post-  
14 conviction habeas corpus petition on April 20, 2015. (See ECF No. 30-4 (Exh. 64).) The  
15 index of exhibits shows this gap. (ECF No. 28 at 5.) The Court has checked the on-line  
16 docket of the state court, and it shows the same gap. *State v. Gonzales*, Case No.  
17 09C259414.<sup>2</sup>

18                   It is difficult to determine whether Gonzales was diligent during the time that he was  
19 litigating his state post-conviction habeas corpus petition. He was litigating in state court,  
20 and that counts in his favor. However, he also knew that he had a timeliness problem in  
21 federal court, but he did not file a contemporaneous protective federal habeas corpus  
22 petition in this Court. See *Pace*, 544 U.S. at 416. Gonzales attributes the lack of a  
23 protective federal petition to state post-conviction counsel, who did not advise him to file  
24 a protective federal petition. (ECF No. 38 at 6.)

25                   After the conclusion of the state post-conviction proceedings, with the issuance of  
26 the remittitur on January 24, 2017, Gonzales again did nothing for almost a year, without

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28                   <sup>2</sup><https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=757224>  
2 (report generated July 28, 2020).

1 explanation, until he dispatched his federal habeas corpus petition to this Court on January  
2 22, 2018.

3 In the end, it does not matter whether the Court finds that Gonzales was diligent  
4 during the time spent on his untimely state post-conviction petition. Gonzales has not  
5 demonstrated diligence during the time before he filed the state post-conviction petition or  
6 after the state post-conviction proceedings concluded. Because equitable tolling is not a  
7 stop-clock procedure but an equitable remedy, Gonzales needs to show diligence up to  
8 the point of mailing his proper-person federal habeas corpus petition to the Court, both for  
9 the times that an extraordinary circumstance prevented timely filing and for the times that  
10 the extraordinary circumstance did not exist. *Smith*, 953 F.3d at 598–99. Even if Gonzales  
11 was acting diligently while he was pursuing his state post-conviction habeas corpus  
12 petition, the two gaps of diligence before and after that petition, considered in combination  
13 or separately, show that equitable tolling is not warranted. Additionally, Gonzales has not  
14 alleged any facts in his opposition that would lead the Court to determine that it needs to  
15 hold an evidentiary hearing to find whether he was diligent.

## 16 2. Gonzales Has Not Demonstrated Extraordinary Circumstances

17 Gonzales argues that abandonment by direct-appeal counsel is an extraordinary  
18 circumstance that prevented timely filing. The Court disagrees. He alleges that direct-  
19 appeal counsel did not communicate with him at all, let alone about the time limits for filing  
20 state and federal habeas corpus petitions. However, Gonzales' letters to direct-appeal  
21 counsel and his motion to compel direct-appeal counsel to send him his file demonstrate  
22 that he knew of the existence of both state and federal time limits. Lack of communication  
23 about the time limits thus could not have been an extraordinary circumstance in Gonzales'  
24 case. Furthermore, counsel sent Gonzales his file about two weeks after the federal one-  
25 year period commenced. Gonzales still had plenty of time to prepare and file a federal  
26 habeas corpus petition, or to file a state habeas corpus petition that, in turn, would have  
27 tolled the federal one-year period under 28 U.S.C. § 2244(d)(2). Consequently, direct-

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1 appeal counsel did not abandon Gonzales, and the lack of communication was not an  
2 extraordinary circumstance that prevented timely filing of a federal habeas corpus petition.

3 Gonzales also argues that post-conviction counsel abandoned him. He argues that  
4 post-conviction counsel could have advised him to file a protective federal habeas corpus  
5 petition. However, a state counsel's lack of advice, or incorrect advice, about the federal  
6 time limit is not an extraordinary circumstance that warrants equitable tolling. *Miranda v.*  
7 *Castro*, 292 F.3d 1063, 1068 (9th Cir. 2002); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th  
8 Cir. 2001).

9 Gonzales himself notes the real problem with anything that post-conviction counsel  
10 did or could have done. "By then, however, most of the damage had been done." (ECF  
11 No. 38 at 6.) The Court disagrees only as to degree. By then, *all* of the damage had been  
12 done. Gonzales had not acted diligently in the two and a half years between the mailing  
13 of his file to him and the filing of the state post-conviction habeas corpus petition, and also  
14 during that time no extraordinary circumstance existed that would have prevented him  
15 from filing a federal petition on time. Direct-appeal counsel did all that was required by  
16 September 28, 2012, and thus could not have been an extraordinary circumstance that  
17 prevented Gonzales from timely filing a federal habeas corpus petition. Post-conviction  
18 counsel tried unsuccessfully to convince the state courts to excuse the untimeliness of the  
19 state petition. (ECF No. 30-15 (Exh. 75) (reply to response to supplemental petition));  
20 (ECF No. 30-24 (Exh. 84) (opening brief on appeal)); (ECF No. 30-27 (Exh. 87) (reply brief  
21 on appeal)). If he had succeeded in excusing the untimeliness of the petition, and then  
22 succeeded on the merits of the petition, then the case would have taken a different path  
23 and timeliness of a federal petition would not be an issue. Without that double success,  
24 however, nothing that post-conviction counsel could have done would have brought back  
25 those two and a half years of inaction without explanation. Post-conviction counsel thus  
26 did not abandon Gonzales, and Gonzales has not demonstrated that post-conviction  
27 counsel created an extraordinary circumstance that prevented timely filing of a federal  
28 habeas corpus petition.

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**C. The Court Will Not Address Respondents' Other Arguments**

Respondents present two other arguments. First, they argue that grounds 2(a), 2(b), and 2(c) are procedurally defaulted because Gonzales raised them in his state post-conviction petition, which was untimely under state law. Second, they argue that ground 2(d) is unexhausted because Gonzales has not raised that claim in any state-court proceeding. The Court will not address these arguments because the Court is dismissing the entire action as untimely.

**V. CONCLUSION**

Reasonable jurists would not disagree with the Court's conclusion, and the Court will not issue a certificate of appealability.

It is therefore ordered that Respondents' motion to dismiss (ECF No. 27) is granted. This action is dismissed with prejudice because it is untimely. The Clerk of the Court is directed to enter judgment accordingly and to close this case.

DATED THIS 5<sup>th</sup> day of August 2020.



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MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE