

1 and his custody illegal. (Id. at 6-7.) The respondents in that action produced a copy of the
2 judgment of conviction. (Ex. 33 (ECF No. 15-31) at 6-7.) On October 13, 2016, Petitioner
3 filed a motion to correct an illegal sentence in the state district court. (Ex. 34 (ECF No. 15-
4 32).) On November 21, 2016, the state district court denied the habeas corpus petition
5 because it was untimely under NRS § 34.726 and because Petitioner's claim was moot.
6 (Ex. 43 (ECF No. 15-41) at 2-3.) The state district court also denied the illegal-sentence
7 motion. (Id. at 2.) Petitioner appealed. The Nevada Supreme Court affirmed on June 15,
8 2017. (Ex. 51 (ECF No. 15-49).) However, the Nevada Supreme Court held that the time
9 bar did not apply in Petitioner's case. (Id. at 1 n.2.) Remittitur issued on July 14, 2017. (Ex.
10 53 (ECF No. 15-51).)

11 Petitioner does not state when he mailed his federal habeas corpus petition to this
12 court. The Court received the Petition on March 13, 2018. (ECF No. 1.)

13 **III. LEGAL STANDARD**

14 Congress has limited the time in which a person can petition for a writ of habeas
15 corpus under 28 U.S.C. § 2254:

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

- 18 (A) the date on which the judgment became final by the conclusion of
19 direct review or the expiration of the time for seeking such review;
- 20 (B) the date on which the impediment to filing an application created by
21 State action in violation of the Constitution or laws of the United States
22 is removed, if the applicant was prevented from filing by such State
23 action;
- 24 (C) the date on which the constitutional right asserted was initially
25 recognized by the Supreme Court, if the right has been newly
26 recognized by the Supreme Court and made retroactively applicable
27 to cases on collateral review; or
- 28 (D) the date on which the factual predicate of the claim or claims
presented could have been discovered through the exercise of due
diligence.

26 28 U.S.C. § 2244(d)(1). If the judgment is not appealed, then it becomes final 30 days
27 after entry, when the time to appeal to the Nevada Supreme Court has expired. See
28 *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012); see also Nev. R. App. P. 4(b), 26(a). If the

1 date on which the period would commence occurred before enactment of § 2244(d)(1) on
2 April 24, 1996, then the period commenced on the next day, April 25, 1996. *Patterson v.*
3 *Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Any time spent pursuing a properly filed
4 application for state post-conviction review or other collateral review does not count toward
5 this one-year limitation period. 28 U.S.C. § 2244(d)(2). The period of limitation resumes
6 when the post-conviction judgment becomes final upon issuance of the remittitur.
7 *Jefferson v. Budge*, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). An untimely state post-
8 conviction petition is not “properly filed” and does not toll the period of limitation. *Pace v.*
9 *DiGuglielmo*, 544 U.S. 408, 417 (2005).

10 **IV. DISCUSSION**

11 If the Court used the finality of Petitioner’s judgment of conviction as the starting
12 date of the one-year period of limitation, then this action would be untimely. The period
13 actually would not have started until April 25, 1996, because Petitioner’s judgment of
14 conviction became final before enactment of 28 U.S.C. § 2244(d). The only matter that
15 was pending in the state courts over the following year was Petitioner’s untimely notice of
16 appeal, which had no effect upon the period of limitation. The one-year period expired at
17 the end of April 24, 1997. Petitioner’s state habeas corpus petition and illegal-sentence
18 motion, filed in September and October 2016, would not have qualified for tolling under 28
19 U.S.C. § 2244(d)(2). The one-year period already had expired. A state habeas corpus
20 petition and a motion for other collateral review do not toll § 2244(d)(1)’s period of
21 limitations when the period has already expired. *Ferguson v. Palmateer*, 321 F.3d 820,
22 823 (9th Cir. 2003).

23 Petitioner states that he did not learn until February 2016 about the sentencing
24 judge’s recommendation of no parole. (Petition at 4 (ECF No. 8).) If the Court assumed
25 that Petitioner learned of the recommendation on February 29, 2016, the last possible
26 date, and if the court used that date as the starting point of the one-year period under 28
27 U.S.C. § 2244(d)(1)(D), then this action still would be untimely. One hundred ninety days
28 passed between February 29, 2016, and September 6, 2016, when Petitioner filed his

1 state habeas corpus petition. (Ex. 31 (ECF No. 15-29).) His motion to correct an illegal
2 sentence followed more than a month later, on October 13, 2016. (Ex. 34 (ECF No. 15-
3 32).) The Nevada Supreme Court held that the time bar of NRS § 34.726(1) did not apply
4 to Petitioner's habeas corpus petition. (Ex. 51 (ECF No. 15-49) at 1 n.2.) The state habeas
5 corpus petition would have qualified for tolling the one-year period under 28 U.S.C.
6 § 2244(d)(2).¹ The Nevada Supreme Court issued its remittitur on July 14, 2017. (Ex. 53
7 (ECF No. 15-53).) Between that date and this Court's receipt of the federal habeas corpus
8 petition, 242 days passed. A total of 432 non-tolled days passed. That exceeds the one-
9 year limit. This action would be untimely even if the one-year period of limitation began
10 when Petitioner learned of the sentencing judge's comments.

11 The Court will not address Respondents' argument that Petitioner has not
12 exhausted his state-court remedies. The Court instead is dismissing the action because it
13 is untimely.

14 In response to the motion to dismiss, Petitioner filed a notice of withdrawal (ECF
15 No. 18). The Court construes this notice as a concession that the motion to dismiss has
16 merit. Even if the Court were to determine that Petitioner's notice supersedes the motion
17 to dismiss, the outcome would be the same. The Petition was untimely when Petitioner
18 filed it. Any petition that Petitioner would file after dismissal of this action also would be
19 untimely. The Court still would dismiss this action with prejudice.

20 Reasonable jurists would not find the Court's conclusions to be debatable or wrong.
21 The Court will not issue a certificate of appealability.

22 **V. CONCLUSION**

23 It is therefore ordered that Respondents' motion to dismiss (ECF No. 14) is granted.
24 This action is dismissed with prejudice as untimely. The Clerk of the Court is instructed to
25 enter judgment accordingly and close this action.

27 ¹The illegal-sentence motion also would have qualified for tolling under 28 U.S.C.
28 § 2244(d)(2), but Petitioner filed it after he filed his state habeas corpus petition and it
concluded at the same time as the state habeas corpus petition. The illegal-sentence
motion would not have tolled any additional time.

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It is further ordered that no further action be taken on Petitioner's notice of withdrawal (ECF No. 18).

It is further ordered that a certificate of appealability will not issue.

DATED THIS 10th day of April 2019.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE