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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 THOMAS W. S. RICHEY,

9 Petitioner,

10 v.

11 MIKE OBENLAND,

12 Respondent.

CASE NO. C13-5231 BHS

ORDER DECLINING TO ADOPT
REPORT AND
RECOMMENDATION,
DISMISSING PETITION AS
TIME-BARRED, AND DENYING
A CERTIFICATE OF
APPEALABILITY

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14 This matter comes before the Court on the Report and Recommendation (“R&R”)
15 of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 56), and
16 Petitioner Thomas W.S. Richey’s (“Richey”) objections to the R&R (Dkt. 59).

17 **I. BACKGROUND**

18 Richey was in custody under a state court judgment and sentence that was entered
19 in 1987 for his convictions, by plea, on one count of first-degree felony murder and one
20 count of attempted first-degree murder. Dkt. 41, Exh. 1. On August 23, 2010, the state
21 trial court entered an order correcting the judgment and sentence. *Id.*, Exh. 3. Richey
22 appealed the new judgment. *Id.*, Exh. 5. The Washington Court of Appeals dismissed

1 the appeal holding the ministerial correction was unappealable as a matter of state law.

2 *Id.*, Exh. 7. The Washington Supreme Court denied review, *Id.*, Exh. 11, and, on August
3 8, 2011, denied Richey's motion to modify, *Id.*, Exh. 13.

4 On August 18, 2011, Richey filed a petition for writ of habeas corpus directly in
5 the Washington Supreme Court. *Id.*, Exh. 14. On April 12, 2012, the court dismissed the
6 petition as time-barred. *Id.*, Exh. 20.

7 On March 27, 2013, Richey filed the instant petition in this Court. Dkt. 1. On
8 November 12, 2014, the Ninth Circuit Court of Appeals concluded that the corrected
9 judgment was a new, intervening judgment. Dkt. 34. On December 9, 2015, the Court
10 declined to adopt an R&R recommending that the Court dismiss the petition as time-
11 barred. Dkt. 50. That R&R concluded that Richey was effectively challenging his
12 original judgment and, therefore, his petition was filed sixteen years after the relevant
13 deadline. Dkt. 48 at 17–18. The Court rereferred the matter for further consideration.
14 Dkt. 50.

15 On August 25, 2016, the instant R&R issued recommending that the Court deny
16 the petition on the merits. Dkt. 56. On September 23, 2016, Richey filed objections.
17 Dkt. 59. On November 16, 2016, the Court requested additional briefing on the
18 timeliness of Richey's petition based on the new, intervening judgment and prejudice.
19 Dkt. 61. On January 6, 2017, the state filed a supplemental response. Dkt. 64. On
20 January 9, 2017, Richey filed a supplemental response. Dkt. 65. On January 17, 2017,
21 both parties filed supplemental replies. Dkts. 66, 67.
22

II. DISCUSSION

A. Statutory Tolling

The federal Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) establishes a one-year statute of limitations for filing a federal habeas corpus petition. 28 U.S.C. § 2244(d)(1). That limitations period is tolled, however, while “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” § 2244(d)(2). “When a postconviction petition is untimely under state law, ‘that [is] the end of the matter’ for purposes of § 2244(d)(2).” *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005).

In this case, Richey’s State post-conviction petitions were not properly filed. Even if Richey’s direct appeals of his new judgment were properly filed¹, the Washington Supreme Court denied Richey’s motion to modify the ruling on his direct appeal on August 8, 2011. Richey had 90 days to file a petition for a writ of certiorari with the United States Supreme Court. *Clay v. United States*, 537 U.S. 522, 524 (2003). Richey did not do so, and the judgment became final on November 7, 2011. Richey then had one

¹ The State argues that Richey’s judgment became final the day it was corrected because the state courts concluded that his direct appeals were time-barred. Dkt. 64 at 2–4. The Court concludes that this position is an extension of the authorities cited by the State because none of those authorities stand for this direct rule of law. There is authority for the proposition “that a state prisoner’s failure to comply with the state’s procedural requirements in presenting his claims is barred from obtaining a writ of habeas corpus in federal court by the adequate and independent state ground doctrine.” *Wentzell v. Neven*, 2:10-CV-01024-RLH, 2015 WL 1344786, at *4 (D. Nev. Mar. 23, 2015), certificate of appealability denied (June 29, 2015) (citing *Coleman v. Thompson*, 501 U.S. 722, 73132 (1991)). The State, however, has failed to raise the affirmative defense of the adequate and independent state ground doctrine. *Id.*

1 year to file this petition for federal habeas relief. 28 U.S.C. § 2244(d)(1). Therefore, the
2 time for filing this petition expired on November 7, 2012.

3 On March 27, 2013, Richey filed the instant petition in this Court. Dkt. 1. Richey
4 argues that the one-year statute of limitations was tolled by his personal restraint petitions
5 in state court. Dkt. 65 at 3–6. All of those petitions, however, were denied as time-
6 barred. *See* Dkt. 48 at 5–13. Under binding precedent, time-barred state petitions do not
7 toll ADEPA’s limitations period. *Pace*, 544 U.S. at 414. While the Court recognizes
8 Richey’s arguments that the state court decisions are at odds with the Ninth Circuit
9 decision as to the substantive issue of the controlling judgment, the Court concludes that
10 this is a distinction without a difference because “[w]hen a postconviction petition is
11 untimely under state law, ‘that [is] the end of the matter’ for purposes of § 2244(d)(2).”
12 *Id.* Therefore, the Court concludes that Richey’s petition is untimely and that he is not
13 entitled to statutory tolling under § 2244(d)(2).

14 **B. Equitable Tolling**

15 “Generally, a litigant seeking equitable tolling bears the burden of establishing two
16 elements: (1) that he has been pursuing his rights diligently, and (2) that some
17 extraordinary circumstance stood in his way.” *Id.* at 418.

18 In this case, Richey has failed to show that he is entitled to equitable tolling. The
19 Court agrees with Richey that “[t]here can be little denying that [he] has been diligent in
20 pursuing his rights” Dkt. 65 at 7. Richey, however, has failed to show that there
21 was any extraordinary circumstance that stood in his way to prevent him from filing a
22 protective federal petition before the ADEPA limitations period expired on November 7,

1 2012. *Pace* was binding precedent at that time and explicitly stated that a “prisoner
2 seeking state postconviction relief might avoid this predicament, however, by filing a
3 ‘protective’ petition in federal court and asking the federal court to stay and abey the
4 federal habeas proceedings until state remedies are exhausted.” *Pace*, 544 U.S. at 416.
5 Moreover, a “petitioner’s reasonable confusion about whether a state filing would be
6 timely will ordinarily constitute ‘good cause’ for him to file in federal court.” *Id.* The
7 state Supreme Court explicitly informed Richey that both his direct appeal and his
8 collateral attack were time-barred. Dkt. 41, Exh. 13, 20. Under these facts, Richey fails
9 to show reasonable confusion when his claim was fully exhausted and he was informed
10 that any remedy was time-barred in state court. This is almost the opposite of an
11 extraordinary circumstance preventing a federal filing in that the highest state court held
12 that Richey was precluded from any further form of relief in state court. The only
13 reasonable avenue left was to challenge the adverse state decision in federal court.
14 Instead, Richey chose to repeatedly seek further relief in state court to his peril, and the
15 Court is unable to conclude that this choice amounted to any type of preventative
16 obstacle, much less an extraordinary obstacle.

17 Richey also argues that he was affirmatively misled by the state courts. The Ninth
18 Circuit has held that, “where a petitioner was affirmatively misled to believe that her
19 limitations period was being tolled under the statute, this inaccuracy could entitle her to
20 equitable tolling.” *Rudin v. Myles*, 781 F.3d 1043, 1058 (9th Cir. 2015), *cert. denied sub*
21 *nom. Gentry v. Rudin*, 136 S. Ct. 1157 (2016) (citing *Sossa v. Diaz*, 729 F.3d 1225,
22 1232–35 (9th Cir. 2013)). In *Sossa*, a federal magistrate judge granted the petitioner an

1 extension of time to file an amended petition. *Id.* at 1228. Although petitioner filed an
2 amended petition, the magistrate judge concluded that the amendments did not relate
3 back to the original petition and, therefore, the amended petition was time-barred by 18
4 days even though the original petition was timely. *Id.* The Ninth Circuit reversed,
5 concluding that the petitioner was entitled to equitable tolling because the magistrate
6 judge affirmatively misled the petitioner by granting the motion for an extension of time.
7 *Id.* at 1232–33 (“No litigant, *pro se* or otherwise, asks for an extension of time to file an
8 untimely petition.”).

9 In *Rudin*, the lower state court granted the petitioner relief on the merits, but the
10 state Supreme Court reversed that judgment. *Rudin*, 781 at 1053. The federal district
11 court dismissed the federal petition as time-barred concluding that the petitioner was not
12 entitled to statutory tolling because, under *Pace*, an untimely petition is not a properly
13 filed petition. *Id.* The Ninth Circuit reversed, concluding that the petitioner was
14 affirmatively misled by the lower state court granting the petition on the merits and the
15 first time the petitioner became aware that her state petition was time-barred was when
16 the state Supreme Court issued its opinion. *Id.* at 1058–59. The court also concluded
17 that the petitioner did not have an adverse state decision to challenge until the higher
18 court reversed the lower court and denied the state petition. *Id.*

19 In this case, Richey fails to show that he was affirmatively misled. Richey
20 contends that, “[g]iven the state courts’ consideration of the merits of his claims [in his
21 habeas petitions], [he] had no reason to understand that the federal statute of limitations
22 was continuing to run.” Dkt. 65 at 8. This argument is undermined by the fact that

1 Richey had actual knowledge that his direct appeal and his post-conviction petitions were
2 time-barred. For example, on April 12, 2012, the Washington Supreme Court
3 commissioner stated that “Richey fails to assert any valid basis for avoiding the time bar
4 on collateral attack or for reinstating his appeal.” Dkt. 41, Exh. 20. Richey moved to
5 modify that ruling, and, on June 5, 2012, the Washington Supreme Court denied the
6 motion. *Id.*, Exh. 22. Giving Richey the benefit of the doubt that his direct appeals were
7 timely, he had almost four months from the date of the ruling that his state petition was
8 time-barred to file a federal habeas petition before the deadline of November 7, 2012.
9 There was no extraordinary circumstance preventing the filing of a federal petition during
10 this period of time. Accordingly, the Court concludes that Richey has failed to show that
11 he is entitled to equitable tolling.

12 **C. Certificate of Appealability**

13 In order to receive a certificate of appealability, a petitioner must show that his
14 claims are “debatable amongst jurists of reason.” *Miller-El v. Cockrell*, 537 U.S. 322,
15 336 (2003).

16 In this case, the Court concludes that Richey’s claims are not debatable amongst
17 jurists of reason. While he definitely presents strong arguments for the extension of
18 current law and/or exceptions to current law, his claims fail under binding precedent.
19 Accordingly, the Court denies Richey a certificate of appealability.

20 **III. ORDER**

21 The Court having considered the R&R, Richey’s objections, and the remaining
22 record, does hereby find and order as follows:

- (1) The Court declines to **ADOPT** the R&R on the merits;
- (2) The Court **DISMISSES** Richey's petition as time-barred;
- (3) The Court **DENIES** Richey a Certificate of Appealability; and
- (4) The Clerk shall enter **JUDGMENT** and close this case.

Dated this 18th day of March, 2017.



BENJAMIN H. SETTLE
United States District Judge