APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

INEZ LAMBERT, Petitioner-Appellant, v. ROB PAERSSON, Respondent-Appellee.	No. 19-35946 D.C. No. 3:17-cv-00331-BR District of Oregon, Portland ORDER

Before: CANBY and CALLAHAN, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 59(e) motion. The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

No. 19-35946

UNITED STATE COURT OF APPEALS

FOR THE

NINTH CIRCUIT

INEZ LAMBERT,

Petitioner-Appellant,

v.

ROB PAERSSON,

Respondent-Appellee.

Appeal from the United States District Court

for the District of Oregon

MOTION FOR CERTIFICATE OF APPEALABILITY

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases

Statutes

Rules

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INEZ LAMBERT, Petitioner-Appellant, v. ROB PAERSSON, Respondent-Appellee.	CA No. 19-35946

Inez Lambert ("Petitioner"), pursuant to Fed. R. App. P. 27 and Ninth Cir. Rule 22-1(d) and through undersigned counsel, Oliver Loewy, hereby moves that this Court issue a certificate of appealability ("COA"). Ms. Lambert seeks a certificate of appealability on the District Court's denying equitable tolling on the unique facts of her case and dismissing her case as untimely and on whether, where equitable tolling is at issue, a COA may be granted without a substantial showing that a constitutional right was denied in state court proceedings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Oregon State Criminal Case

On August 24, 2011, Ms. Lambert entered guilty pleas to four felony counts of a twenty-one count Multnomah County, Oregon, indictment. The Circuit Court

imposed a twenty-five year sentence and entered judgment on December 2, 2011. Ms. Lambert did not directly appeal the judgment, but she did commence postconviction proceedings by filing a petition seeking relief on November 8, 2012. The Circuit Court denied postconviction relief. D. Ct. Dkt. 11-1 at 58 (Resp. Ex. 126) (PCR General Judgment). The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied Ms. Lambert's Petition for Review without opinion. *Lambert v. Steward*, 368 P.3d 85 (Or. Ct. App.) (table), 376 P.3d 281 (Or. 2016) (table). The appellate judgment was entered June 3, 2016. D.Ct. Dkt. 11-4 at 111 (Resp. Ex. 132) (Appellate Judgment).

B. The Federal Habeas Corpus Proceedings In District Court

On February 28, 2017, Ms. Lambert filed her habeas petition in the court below. D.Ct. Dkt. 1 (habeas petition). Respondent-Appellee responded to Ms. Lambert's petition by seeking its dismissal as untimely and, immediately thereafter, noting:

> Because that issue is dispositive, respondent will not address the merits of the petition. Should the Court find that the petition was timely filed, respondent would request time to respond on the merits.

D. Ct. Dkt. 9 at 1 (Response To Habeas Petition). Elsewhere below, Respondent-Appellee asserted that only "certain issues" were procedurally defaulted, but he specifically identified neither those issues nor the particular bases for the alleged procedural defaults. D. Ct. Dkt. 10 at 2 (Answer). Relying on Respondent-

Appellee's efficient approach to the litigation, Ms. Lambert did not address the merits of any of her claims -- by, for example, seeking discovery or to supplement the record with additional facts supporting her claims, or arguing why she was entitled to relief on the state court record alone. *See* 28 U.S.C. § 2254(d). Nor, relying on Respondent-Appellee's efficient approach to the litigation did Ms. Lambert object to or otherwise seek to capitalize on Respondent-Appellee's failure to specifically identify which claims were allegedly procedurally defaulted or why. In an eleven page opinion and order, the District Court analyzed and denied Ms. Lambert's request for equitable tolling and, without addressing the parties' evident intent to seek a ruling on equitable tolling before addressing the merits of Ms. Lambert's claims, denied a certificate of appealability solely because "Petitioner has not made a substantial showing of the denial of a constitutional right." D.Ct. Dkt. 44 at 11 (Opinion and Order). The District Court entered its Judgment the same day, again noting that it was denying a certificate of appealability solely because there had been no substantial showing of the denial of a constitutional right. D.Ct. Dkt. 45 (Judgment). The District Court denied Ms. Lambert's Motion to Alter or Amend the Judgment. D.Ct. Dkt. 48.

ARGUMENT

A. The Certificate of Appealability Standard

When a district court denies a habeas petition on a procedural ground rather than on the merits of its claims, "a COA should issue when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This inquiry "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S.Ct. 759, 773 (2016). Indeed, a prisoner need not "show[] that the appeal will succeed[,] . . . only something more than the absence of frivolity or the existence of mere good faith on his or her part[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003). "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.'" *Miller-El* at 337 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). Further, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El* at 338. Thus, a COA should issue when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been

resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In Ms. Lambert's case, the manner in which the District Court resolved her petition is not "beyond all debate." *Welch v. United States*, 136 S.Ct. 1257, 1264 (2016).

B. Jurists of Reason Could Debate Whether The Court Below Should Have Granted Equitable Tolling To Reach The Merits Of Ms. Lambert's Claims, And No Showing Of The Denial Of A Constitutional Right In State Court Proceedings Should Be Required For A COA To Issue Where Equitable Tolling Is At Issue And Where The Parties Did Not Address The Merits Of The Claims In An Effort To Economize The Use Of Their And The Judiciary's Litigation Resources.

1. The Law of Equitable Tolling

A habeas petitioner is "'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The second prong of the *Holland* test does not require a showing that some circumstance made it impossible to file a timely petition. *Fue v. Biter*, 842 F.3d 650, 657 (9th Cir. 2016). Rather, "*Holland* stressed "flexibility" and a disdain for "mechanical rules." *Fue* (quoting *Holland*, 560 U.S. at 650). As *Holland* provided:

> In emphasizing the need for "flexibility," for avoiding "mechanical rules," we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity[.]" The "flexibility" inherent in "equitable procedure" enables courts "to

> meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." . . . [Courts of equity] exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

Id. at 650 (citations omitted). Further, *Holland* made unmistakably clear that attorney negligence may justify equitable tolling. *Id.* at 634-35 (rejecting 11th Circuit's holding that an attorney's negligence or gross negligence can "warrant equitable tolling only if the petitioner offers proof of bad faith, dishonesty, divided loyalty, mental impairment and so forth") (citations omitted). Further, unlike procedural default, equitable tolling does not implicate federalism concerns because "equitable tolling . . . asks whether *federal* courts may excuse a petitioner's failure to comply with federal timing rules, an inquiry that does not implicate a state court's interpretation of state law." *Id.* (italics in original).

As the Court is aware, "'a garden variety claim of excusable neglect,' *Irwin* [*v. Dept. of Veterans Affairs*, 498 U.S. 89,] 96 [(1990)], such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline, *Lawrence* [*v. Florida*, 549 U.S. 327,] 336 [(2007)], does not warrant equitable tolling."

2. The Facts In The Instant Case

While Ms. Lambert's post-conviction case was pending in the state appellate courts, Ms. Lambert's counsel advised her that if the Oregon Supreme Court denied relief, she would have a year from that date to file her federal habeas

petition. Rather than having merely miscalculated the number of days Ms. Lambert would have left in the one-year AEDPA limitations period, her counsel altogether failed to advise that any calculation was necessary. Instead, he advised her—and her brother and her mother—that should the Oregon Supreme Court deny her petition for review, she would have a year from that date in which to file her habeas petition.

After Ms. Lambert was convicted through her guilty pleas and sentenced to 25 years' imprisonment, her family retained counsel for her. That lawyer, Andy Simrin, advised that Ms. Lambert forego direct appeal in favor of filing an application for post-conviction relief. With Ms. Lambert's agreement, on November 16, 2012, Mr. Simrin filed a state post-conviction petition on her behalf. Nearly four years later, on January 11, 2016, the Oregon Court of Appeals affirmed without opinion the denial of relief, and, on April 21, 2016, the Oregon Supreme Court denied Ms. Lambert's petition for review. *Lambert v. Steward*, 368 P.3d 85 (Or. Ct. App. 2016) (table), 376 P.3d 281 (Or. 2016) (table).

Shortly after the Court of Appeals affirmed the denial of relief, Mr. Simrin had conversations with Ms. Lambert, her brother Georvohn Lambert, and their mother Elaine Lambert. D.Ct. Dkt. 28-1 (Inez Lambert affidavit), 28-2 (Georvohn Lambert affidavit), and 28-3 (Elaine Lambert affidavit). In their sworn affidavits, each testifies that Mr. Simrin told them that if the Oregon Supreme Court rejected

Ms. Lambert's appeal, she would have a year from that date to file her habeas petition. Additionally, each testifies to speaking with one another about when and how Ms. Lambert would file her habeas petition. It was determined that Georvohn would help draft the petition, that Ms. Lambert would sign the finalized petition, and that Mrs. Lambert would file the petition in this Court. During the course of their conversations, they confirmed with each other that Mr. Simrin had told each of them that the deadline for filing Ms. Lambert's petition was a year from the date that Oregon Supreme Court rejected her appeal. D.Ct. Dkt. 28-1 at 2, 28-2 at 2, 28-3 at 2.

Mr. Simrin is confident that, after the Oregon Supreme Court denied Ms. Lambert's Petition for Review, he did not verbally advise Ms. Lambert that she had only limited time in which to file a federal habeas petition or explain to her the tolling calculations leading to that conclusion. *See* D.Ct. Dkt. 28-4 at 3 (Andy Simrin affidavit). Rather, he advised her only once that she would have less than a year after the Oregon Supreme Court denied her Petition for Review in which to file her federal habeas petition. *Id.* at 2 & at 14 (Simrin 10/19/2012 letter to Ms. Lambert). Mr. Simrin gave her that advice in an October 2012 letter, sent before state post-conviction proceedings had even commenced and nearly four years before the Oregon Supreme Court denied her Petition for Review, thus nearly four years before the time remaining on the limitations period in Ms. Lambert's case

would require any action on her part other than to have the state court post-conviction petition filed.[1] *Id.*

When it came time for Ms. Lambert to take action based on the AEDPA limitation period, i.e., when the Oregon Supreme Court denied her petition for review, Mr. Simrin alerted her to that denial by letter. *See* D.Ct. Dkt. 28-4 at 3 (Simrin Affidavit) and at 18 (Simrin 4/22/2016 letter to Ms. Lambert). In his April 22, 2016, letter to Ms. Lambert, however, Mr. Simrin stated only that "there are strict time limits for getting a habeas corpus case filed." *Id.* He did not advise her that the AEDPA provided a one-year limitation period for filing her petition, that any calculation needed to be made to determine the date by which she needed to file her federal habeas petition, or that the strict time limits left her with very little time in which to file her petition. *Id.*

While Mr. Simrin did not, in 2016, verbally or in writing advise Ms. Lambert that the one-year limitations period for filing her federal habeas petition

[1] In two earlier letters, Mr. Simrin had cautioned Ms. Lambert that filing her state post-conviction petition more than a year after the trial court judgment would preclude her from seeking federal habeas relief. *See* D.Ct. Dkt. 28-4 at 6 (Simrin 12/12/2011 letter to Ms. Lambert) and at 10 (Simrin 12/23/2011 letter to Ms. Lambert). However, in neither letter did he explain that even if she did file her state petition before a year passed from the criminal judgment, she would nevertheless have less than a year in which to file her federal habeas petition. *Id.* Nor did he write that any calculation needed to be made to determine how much time she would have to file a federal habeas petition once state post-conviction proceedings were complete. *Id.*

was nearly expired or that calculations needed to be made to determine when the period would expire, he agrees that he may have provided a very general statement to Ms. Lambert sometime in 2016 that there is a one-year limitations period for filing a federal habeas petition. D.Ct. Dkt. 28-4 at 3-4 (Simrin Affidavit). However, he would not have provided any more specific information about that period, how to calculate it, and its implications for her case. *Id.*

3. Reasonable Jurists Would Find It Debatable Whether The District Court Was Correct In Its Procedural Ruling.

Reasonable jurists could debate in at least the following three respects whether Ms. Lambert's petition should have been resolved in a different manner.

First, the District Court rejected Ms. Lambert's argument that Mr. Simrin's erroneous advice constituted an extraordinary circumstance sufficient to warrant equitable tolling, reasoning that Mr. Simrin's advising Petitioner in 2012 that the AEDPA one-year limitation period was running negated his later advice that the one-year limitation period started running only when the Oregon Supreme Court denied her postconviction petition for review. Opinion and Order at 8-9. Mr. Simrin provided his earlier advice four years before it had any pragmatic consequence, as he commenced state postconviction proceedings shortly after rendering that advice. When he provided his later advice, though, it had critical pragmatic impact because it counseled Petitioner that she had a full year to file her federal habeas petition from the date on which the Oregon Supreme Court had very

recently denied postconviction review. A reasonable jurist could have found that Simrin's later advice was grossly erroneous not only because he provided the wrong trigger date but also because he failed to indicate that any calculation was necessary other than adding 365 days to the trigger date.

Second, the District Court reasoned that Simrin's earlier advice implied that some further calculation was necessary and that his later otherwise wrong advice did not indicate that no calculation was necessary. However, a reasonable jurist could have found that the absence of any indication in Simrin's later advice that the one-year limitation period had already been nearly fully consumed (or consumed at all) clearly implied that there was no calculation adding 365 days to the trigger date to determine the due date for the habeas petition. That clear implication contradicts Simrin's advice rendered four years earlier. Further, the District Court's reasoning that Simrin's later advice did not indicate that no calculation was necessary squarely contradicts Simrin's sworn statement that in 2016 he did not advise Petitioner "that a calculation needed to be made to determine the date by which she needed to file her federal habeas petition" and that at that time he did not "warn her that the strict time limits for filing a habeas petition left her with very little time in which to file her petition." D.Ct. Dkt. 28-4 at 3 (Affidavit of Andy Simrin). Thus, a reasonable jurist could have determined that Simrin's later advice *did* indicate that no calculation was necessary. Advising

Ms. Lambert that she had a full year from the date the Oregon Supreme Court rejected her appeal was not an arithmetical error but so grossly misstated the law that it constitutes an extraordinary instance of professional misconduct meriting equitable tolling. "Attorney mistakes that warrant the label 'garden variety'—like miscalculating a filing deadline—are the sorts of mistakes that, regrettably, lawyers make all the time. They are mistakes made routinely enough that they're regarded as one of the risks petitioners typically assume when relying on counsel to litigate a case, rather than as an extraordinary circumstance warranting equitable intervention." *Luna v. Kernan*, 784 F.3d 640, 647 (9th Cir. 2015). Lawyers may miscalculate due dates all the time, but those errors are based on an understanding that a calculation needs making. Here, Mr. Simrin did not advise that any calculation was needed beyond extending by a year the date on which the Oregon Supreme Court rejected Ms. Lambert's appeal. Lawyers do not "all the time" fail to apply (or alert their clients to) the AEDPA tolling provisions to determine the AEDPA deadline for filing a habeas petition. While it may not be fundamentally unfair to expect petitioners to remember advice provided four years earlier at a time when the subject of the advice had no pragmatic consequence, it is unfair, unjust, and inequitable to require that petitioners choose between contradictory earlier and later advice, particularly when the later advice was incorrect. *See*

Holland v. Florida, 560 U.S. 631, 650 (2010) (equitable intervention allows courts to correct injustice).

Third, the District Court found that Petitioner did not exercise reasonable diligence sufficient to warrant equitable tolling. Opinion and Order at 9-10. The Court reasoned that Petitioner was not reasonably diligent because even though she filed her petition by the year's deadline Simrin had advised existed, she did not first attempt to file her habeas petition until six months after he had advised her to contact a federal public defender "as soon as possible, because there are strict time limits for getting a habeas corpus filed." Opinion and Order at 10 (internal quotation marks and citation omitted). The Court also faults Petitioner because when the court clerk rejected her habeas petition, Petitioner waited "a further four months before re-submitting it." Opinion and Order at 10. But Petitioner filed her habeas petition approximately two months in advance of the deadline Simrin had advised existed and which Petitioner in good faith believed was the true deadline. Because Petitioner acted diligently to file her habeas petition by the deadline she reasonably and in good faith believed was accurate, she acted diligently to timely file her petition. See *Grant v. Swarthout*, 862 F.3d 914, 919 (9th Cir. 2017) ("a petitioner is entitled to use the full one-year statute-of-limitations period for the filing of his state and federal habeas petitions" and it is "inherently reasonable for a petitioner to rely on [the] statute of limitations and to plan on filing at any point

within that period"). Finding a petitioner is not diligent where she files by what she reasonably and in good faith believes is the AEDPA deadline is no more than a finding that petitioner's reasonable and good faith belief is wrong. Put differently, if the District Court's ruling is correct, no petitioner who files a petition by the deadline which she reasonably, in good faith, but wrongly believes to be the AEDPA deadline can be diligent. By thus precluding equitable tolling anytime a petition is filed late due to counsel having failed to advise that calculations need to be made to determine the due date, the Court's ruling cannot be squared with the Supreme Court's test for when equitable tolling is required. *Holland v. Florida*, 560 U.S. at 649 (habeas petitioner is entitled to equitable tolling where he shows that he has been pursuing his right diligently and that some extraordinary circumstance stood in his way of timely filing his petition).

4. Where, To Economize The Use Of Their And The Judiciary's Litigation Resources, The Parties Restrict Their Briefing To The Threshhold Issue Of Whether Equitable Tolling Is Warranted, The District Court And This Court Should Assume For Certificate Of Appealability Purposes That The Petitioner Has Made A Substantial Showing Of The Denial Of A Constitutional Right.

In the court below, Respondent-Appellee responded to Ms. Lambert's petition by seeking its dismissal as untimely and, immediately thereafter, noting:

> Because that issue is dispositive, respondent will not address the merits of the petition. Should the Court find that the petition was timely filed, respondent would request time to respond on the merits.

D. Ct. Dkt. 9 at 1 (Response To Habeas Petition). Elsewhere below, Respondent-Appellee asserted that only "certain issues" were procedurally defaulted, but he specifically identified neither those issues nor the particular bases for the alleged procedural defaults. D. Ct. Dkt. 10 at 2 (Answer). Relying on Respondent-Appellee's efficient approach to the litigation, Ms. Lambert did not address the merits of any of her claims -- by, for example, seeking discovery or to supplement the record with additional facts supporting her claims, or arguing why she was entitled to relief on the state court record alone. *See* 28 U.S.C. § 2254(d). Nor, and again in reliance on Respondent-Appellee's efficient approach to the litigation, did Ms. Lambert object to or otherwise seek to capitalize on Respondent-Appellee's failure to specifically identify which claims were allegedly procedurally defaulted or why. In this context, the District Court devoted its eleven page Opinion and Order to an analysis and rejection of Ms. Lambert's request for equitable tolling. It denied a COA without any discussion of the merits of any claim solely because Ms. Lambert did not make a substantial showing of the denial of a constitutional right. In this context, requiring petitioners to make that substantial showing will require them—and, thus, opposing counsel and habeas courts—to expend significant resources even though in many cases equitable tolling properly will not be granted. Those significant resources will include discovery disputes, the hiring of experts, motions for and at least sometimes the

conducting of evidentiary hearings, as well as complex and time-consuming legal and factual analysis.

CONCLUSION

For all these reasons and for all those reasons set out in her briefing before the District Court, Ms. Lambert respectfully asks that the Court grant a certificate of appealability on whether equitable tolling should be granted in this case and on whether, where equitable tolling is at issue, a COA may be granted without a substantial showing that a constitutional right was denied in state court proceedings.

Respectfully submitted this 18th day of December 2019.

/s/ Oliver W. Loewy
Oliver W. Loewy
Assistant Federal Public Defender
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2019, I electronically filed the foregoing Petitioner-Appellant's Motion for Certificate of Appealability with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michelle Rawson
Michelle Rawson

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

INEZ LAMBERT,

Petitioner,

v.

ROB PAERSSON,

Respondent.

Civil No. 3:17-cv-00331-BR

OPINION AND ORDER

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BROWN, Senior Judge.

Petitioner, an inmate at the Coffee Creek Correctional Institution, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. For the reasons that follow, the Court DENIES the Petition for Writ of Habeas Corpus (ECF No. 1).

BACKGROUND

On January 18, 2011, a Multnomah County grand jury indicted Petitioner on six counts of Sodomy in the First Degree, seven counts of Using a Child in a Display of Sexually Explicit Conduct, and six counts of Sexual Abuse in the First Degree. Resp. Exh. 102, pp. 1-3. Pursuant to a plea agreement, on December 2, 2011, the trial court entered a judgment of conviction on two counts of Sodomy in the First Degree and two counts of Using a Child in a Display of Sexually Explicit Conduct. Resp. Exh. 101. The trial judge sentenced Petitioner to a total of 25 years of imprisonment. Resp. Exh. 101.

Petitioner did not file a direct appeal. On November 8, 2012, Petitioner filed a petition for state post-conviction relief ("PCR"). The PCR trial court denied relief. Resp. Exh. 126. Petitioner appealed, but the Oregon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied review. *Lambert v. Steward*, 276 Or. App. 461, 368 P.3d 85, *rev. denied*, 359 Or. 166, 376 P.3d 281 (2016). The appellate judgment issued on June 3, 2016. Resp. Exh. 132.

On February 28, 2017, Petitioner filed her Petition for Writ of Habeas Corpus in this Court. Petitioner concedes her Petition was untimely. Petitioner argues, however, that the Court should equitably toll the statute of limitations and consider the Petition on its merits. Respondent disagrees, and asks the Court to dismiss the action as untimely.

LEGAL STANDARDS

Equitable tolling is available to toll the one-year statute of limitations available to 28 U.S.C. § 2254 habeas corpus cases. *Holland v. Florida*, 560 U.S. 631, 645 (2010). A litigant seeking to invoke equitable tolling must establish: (1) that she has been pursuing her rights diligently; and (2) that some extraordinary circumstance prevented her from timely filing the petition. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). A petitioner who fails to file a timely petition due to her own lack of diligence is not entitled to equitable tolling. *Tillema v. Long*, 253 F.3d 494, 504 (9th Cir. 2001), *overruled on other grnds by Pliler v. Ford*, 542 U.S. 225, 231 (2004). The petitioner bears the burden of showing that this "extraordinary exclusion" should apply. *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002). The test for equitable tolling "is a very high bar, and is reserved for rare cases." *Yow Ming Yeh v. Martel*, 751 F.3d 1075, 1077 (9th Cir.), *cert. denied*, 135 S. Ct. 486 (2014).

Generally, claims for equitable tolling based upon attorney error do not arise to the level of an extraordinary circumstance sufficient to warrant equitable tolling. *See, e.g., Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) (attorney negligence in general does not justify equitable tolling); *Holland*, 560 U.S. at 651-52 ("garden variety" negligence does not warrant equitable tolling). "Justice Alito explained his understanding of the logic behind this framework, reasoning that, 'the principal rationale . . . is that the error of an attorney is constructively attributable to the client and thus is not a circumstance beyond the litigant's control.'" *Gibbs v. Legrand*, 767 F.3d 879, 885 (9th Cir. 2014) (quoting *Holland*, 560 U.S. 657 (Alito, J., concurring)), *cert. denied* 135 S. Ct. 1708 (2015). Equitable tolling based upon attorney performance is only appropriate where: (1) an attorney's performance goes beyond error and amounts to "egregious professional misconduct;" or (2) the attorney abandons her client altogether. *Luna v. Kernan*, 784 F.3d 640, 646 (9th Cir. 2015);

DISCUSSION

Here, the § 2244(d) limitation period began to run on January 3, 2012, the date that the 30-day time period expired for Petitioner to file a direct appeal.[1] Prior to the expiration of

[1]In *Bowen v. Roe*, 188 F.3d 1157 (9th Cir. 1999), the Ninth Circuit held that criminal convictions are not final until the time has elapsed for seeking a writ of *certiorari* in the U.S. Supreme Court. Here, however, Petitioner could not have sought *certiorari* because she did not file a direct appeal. *See* 28 U.S.C. § 1257(a)

the time to appeal her conviction and sentence, Petitioner's family retained attorney Andy Simrin to represent Petitioner. Simrin advised Petitioner to forego a direct appeal in favor of filing a PCR petition.

Prior to filing the state PCR petition, Simrin wrote Petitioner three times advising her of the time limitations for filing a federal habeas petition. On December 12, 2011, Simrin wrote:

> There is a two-year time limit for starting a post-conviction case. If you take an appeal, the two-year time limit would not even start until after your appeal is completed. If you do not take an appeal, then the two-year time limit will have started on the day that the judgment was entered into the register. Although there is a two-year time limit for seeking post-conviction relief, a post-conviction case should be filed as soon as possible and must be filed within the first year in order to preserve your right to subsequently seek federal habeas corpus relief in the event that your post-conviction case is not successful.

(ECF No. 28) Exh. 4. On December 23, 2011, Simrin wrote a letter expanding on this advice:

("[f]inal judgments or decrees rendered by *the highest court of a State in which a decision could be had*, may be reviewed by the Supreme Court by a writ of *certiorari*"). Thus, the limitation period began to run when the time to file a direct appeal expired. *See Swantz v. Mills*, Case No. 09-1161-SU, 2010 WL 2608337 (D. Or. May 20, 2010) (where petitioner did not first petition Oregon's appellate courts petitioner was not entitled to additional 90 days under *Bowen*); *see also Hemmerle v. Schriro*, 495 F.3d 1069, 1073-74 (9th Cir. 2007) (concluding that where petitioner did not seek review from Arizona's supreme court, his direct appeal was final for the purposes of the limitation period set out at § 2244(d)(1) when his time for seeking review in Arizona's supreme court had expired).

> The judgment in your criminal case was entered into the trial court register on December 2, 2011. That means that you would have until December 1, 2013, to file a petition for post-conviction relief if you decided that is what you want to do. However, if you wish to preserve your right to subsequently seek federal habeas corpus relief in the event that your post-conviction case is not successful, you should file your state post-conviction petition as early as possible and you must file it within the first year after the judgment was entered into the register. If you waited until after the first year to file a petition for post-conviction relief, you would not be able to seek federal habeas corpus relief afterwards.

(ECF No. 28) Exh. 4. Finally, on October 19, 2012, Simrin wrote a letter to Petitioner describing the § 2244(d)(1) limitation period as follows:

> If we do seek post-conviction relief, but are not successful, you may then file a petition for writ of habeas corpus in federal court. There is a one-year time limit for filing a petition for habeas corpus. That one-year time limit started running when the judgment in your criminal case was entered into the trial court register on December 2, 2011. If we file a petition for post-conviction relief, that one-year time would get put on hold until the post-conviction case was over. The one-year federal habeas corpus timer wouldn't start all over after the post-conviction case. Instead, you would have however much time was still remaining at the time that the post-conviction case was started. As of now, the federal habeas corpus timer has been running for ten and a half months. That means that you have a month and a half left on your federal timer.

(ECF No. 28) Exh. 4.

On November 8, 2012, Simrin filed a state PCR petition. As noted, the PCR trial court denied relief, and Petitioner did not prevail on appeal. On April 22, 2016, after the Oregon Supreme denied a petition for review but before the appellate judgment

issued, Simrin wrote Petitioner informing her as such and advising as follows:

> In a few weeks, the Court of Appeals will issue a document called the appellate judgment, which signifies that the appeal process is formally completed. If you wish to seek federal habeas corpus relief, you should contact the federal public defender as soon as possible, because there are strict time limits for getting a habeas corpus case filed.

(ECF No. 28), Exh. 4. The appellate judgment issued on June 3, 2016. Resp. Exh. 132.

Petitioner submits affidavits stating that shortly after the Oregon Court of Appeals issued an affirmance in the state PCR case, Simrin had conversations with Petitioner, her brother, and her mother. (ECF No. 28) Exhs. 1, 2, and 3. In the affidavits, each states that Simrin told them that if the Oregon Supreme Court rejected Petitioner's appeal, Petitioner would have one year from that date to file her federal habeas petition. Also, during the course of conversations among the three, they confirmed with each other that Simrin had told each of them that the deadline was a year from the date the Oregon Supreme Court rejected the appeal.

Petitioner also submits an affidavit from Simrin, who states that he has no memory of verbally advising Petitioner of the one-year limitation period, that tolling of the limitations period needs to be calculated to determine how much of the limitations period remains at any given time in a particular case, how to calculate that tolling, or that anything less than a year of the

limitations period remained in her case at any particular time. (ECF No. 28) Exh. 4. Simrin reviewed his files, and located no notes of conversations with her in which he provided verbal advice regarding the limitations period. Simrin further explained:

> When the federal habeas limitation period has nearly expired in a client's case, it is my general practice to write to the client at the conclusion of state post-conviction proceedings alerting them to how much time is left to file their habeas petition and explaining the tolling calculations which allow me to reach that conclusion. My review of my file confirms that I did not send such a letter to [Petitioner]. Likewise, my file notes do not indicate that I verbally alerted [Petitioner] that the limited time she had left to file a habeas petition was nearly expired. The absence of any note in my file memorializing that I gave such advice verbally confirms to me that I did not advise her about that, nor did I explain to her the tolling calculations leading to that conclusion.

(ECF No. 28) Exh. 4.

Petitioner's brother prepared a federal habeas petition for Petitioner's signature, and sometime in October 2016, Petitioner's mother unsuccessfully attempted to file it with this Court; the Clerk rejected the petition for a reason Petitioner's mother could not recall. Petitioner's mother returned to the courthouse in February 2017, and successfully filed the petition.

Petitioner argues that she is entitled to equitable tolling because Simrin misadvised her as to when the limitation period started to run. She contends that Simrin did more than merely miscalculate the filing deadline, and instead, altogether failed to advise that any calculation was necessary. As discussed above,

however, Simrin advised Petitioner before the state PCR action was initiated of the fact that the habeas limitation period was already running. Moreover, even if Simrin erroneously advised Petitioner and her family that the one-year limitation period would start to run when the Oregon Supreme Court rendered its decision, that alleged advice does not indicate that no calculation was necessary. Instead, the alleged advice incorrectly indicates the date from which to calculate the limitation period, a miscalculation which is not sufficient to warrant equitable tolling. *See Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) ("[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no right to counsel"); *Maples v Thomas*, 565 U.S. 266, 281 (2012) (restating "that an attorney's negligence, for example, miscalculating a filing deadline, does not provide a basis" for equitable tolling); *Gonzales-Gutierrez v. Nooth*, Case NO. 2:16-cv-01969-MA, 2018 WL 2027732, at *3 (D. Or. April 30, 2018) (where PCR counsel led petitioner to believe that his federal habeas corpus petition would be timely if filed at the conclusion of state PCR proceedings, equitable tolling not warranted).

Further, the circumstances presented by Petitioner do not demonstrate the exercise of reasonable diligence sufficient to warrant equitable tolling. As noted, after the Oregon Supreme Court declined to review the dismissal of petitioner's PCR

petition, but before the appellate judgment issued, Simrin advised petitioner that she should contact a federal public defender "as soon as possible, because there are strict time limits for getting a habeas corpus filed." (ECF No. 28), Exh. 4. Petitioner did not first attempt to file her habeas petition until some six months after this advice, and when the petition was rejected by the clerk, waited a further four months before re-submitting it. Other than re-stating her reliance upon Simrin's alleged verbal advice that she had one year to file the petition, Petitioner provides no further explanation for this delay. Consequently, Petitioner fails to meet the "diligent pursuit" prong of the equitable tolling analysis. *See Mendoza v. Carey*, 449 F.3d 1065, 1071 n.6 (9th Cir. 2006) ([t]he diligence prong in *Pace* requires a petitioner to show he or she engaged in reasonably diligent efforts to file the § 2254 petition throughout the time the limitations period was running); *Cornejo v. Lizarraga*, Case No. 2:16-cv-2594 KJM AC P, 2018 WL 1567821, at *3 (E.D. Cal. 2018) (petitioner's failure to document any actions taken in pursuit of rights or lack of capacity to take such actions demonstrated lack of reasonable diligence).

Finally, Petitioner asks the Court to conduct an evidentiary hearing if not inclined to grant equitable tolling on the record before the Court. Because the record in this case is sufficiently developed to resolve the issues before the Court, Petitioner's request for an evidentiary hearing is denied. *See Rhoades v.*

Henry, 638 F.3d 1027, 1041 (9th Cir. 2011); *see also Roy v. Lampert*, 465 F.3d 964, 969 (9th Cir. 2006) (in order to merit an evidentiary hearing, a petitioner must first make "sufficient allegations of diligence").

CONCLUSION

For these reasons, the Court DENIES the Petition for Writ of Habeas Corpus (ECF No. 1) and DISMISSES this case. The Court DENIES a certificate of appealability as Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

DATED this 13th day of August, 2019.

ANNA J. BROWN
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

INEZ LAMBERT,

Petitioner,

v.

ROB PAERSSON,

Respondent.

Case No. 3:17-cv-00331-BR

JUDGMENT

BROWN, Senior Judge.

Based on the Record,

IT IS ORDERED AND ADJUDGED that this Action is dismissed. The Court DENIES a certificate of appealability as Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

DATED this 13th day of August, 2019.

ANNA J. BROWN
United States Senior District Judge

1 - JUDGMENT