

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 30 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ELIAS G. MONTALVO,

No. 21-15102

Petitioner-Appellant,

D.C. No. 3:20-cv-00131-MMD-WGC
District of Nevada,
Reno

v.

BACA, Warden; ATTORNEY GENERAL
FOR THE STATE OF NEVADA,

ORDER

Respondents-Appellees.

Before: IKUTA and MILLER, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) 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).

All pending motions are denied as moot.

DENIED.

“Appendix A”

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ELIAS G. MONTALVO,

Case No. 3:20-cv-00131-MMD-WGC

Petitioner,

ORDER

v.

ISIDRO BACA, *et al.*,

Respondents.

I. SUMMARY

This case began with a *pro se* petition for a writ of habeas corpus, under 28 U.S.C. § 2254, filed by Elias G. Montalvo, an individual incarcerated at the Northern Nevada Correctional Center. Before the Court is Respondents' motion to dismiss. (ECF No. 17.) As further explained below, the Court will grant the motion on the ground that Montalvo's petition is barred by the statute of limitations, and will dismiss this action.

II. BACKGROUND

On November 2, 2015, following a jury trial, Montalvo was convicted of second-degree murder, and he was sentenced to life in prison with parole eligibility after ten years. (ECF No. 24-6 (judgment of conviction).) Montalvo appealed, and the Nevada Court of Appeals affirmed his conviction on January 19, 2017. (ECF No. 28-5.)

On May 17, 2017, Montalvo filed a *pro se* state habeas corpus petition in the state district court. (ECF No. 28-11.) The state district court denied Montalvo's petition on November 29, 2017. (ECF No. 29-7.) Montalvo appealed, and the Nevada Supreme Court affirmed on July 20, 2018. (ECF No. 29-20.) The Nevada Supreme Court denied

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1 rehearing on September 27, 2018. (ECF No. 29-22.) The Nevada Supreme Court's
2 remittitur was issued on October 25, 2018. (ECF No. 29-27.)

3 In the meantime, on October 12, 2018, Montalvo filed a second *pro se* state habeas
4 corpus petition. (ECF No. 29-23.) On February 15, 2019, the state district court denied
5 Montalvo's second state petition, ruling it untimely, successive, and procedurally barred.
6 (ECF No. 30-5.) Montalvo appealed, and the Nevada Court of Appeals affirmed, on those
7 same grounds, on November 27, 2019. (ECF No. 30-14.) The remittitur in that case was
8 issued on December 24, 2019. (ECF No. 29-27.)

9 This Court received Montalvo's *pro se* federal habeas petition for filing, initiating
10 this case, on February 25, 2020. (ECF No. 7.) Montalvo's signature on the petition is
11 dated February 24, 2020 (*id.* at 40), so the Court considers it to have been filed on that
12 date. See *Houston v. Lack*, 487 U.S. 266, 270 (1988) (deeming document constructively
13 filed when prisoner submits it to prison authorities for mailing to the court for filing); see
14 also *Butler v. Long*, 752 F.3d 1177, 1178 n.1 (9th Cir. 2014) (per curiam) (as amended)
15 (presuming document was turned over to prison authorities for filing on date signed).

16 Respondents filed their motion to dismiss on August 17, 2020 (ECF No. 17),
17 arguing that Montalvo's action was untimely filed, that certain claims in his petition are
18 unexhausted in state court, that one of his claims is duplicative, and that one of his claims
19 is procedurally defaulted. Montalvo filed an opposition to the motion (ECF No. 36), and
20 Respondents replied (ECF No. 43).

21 Montalvo filed a motion for evidentiary hearing on September 22, 2020 (ECF No.
22 35). Respondents filed an opposition to that motion (ECF No. 37), and Montalvo replied
23 (ECF No. 42).

24 Respondents filed their reply in support of their motion to dismiss one day after the
25 deadline for that filing. Montalvo filed a motion to strike Respondents' reply on the ground
26 that it was filed late (ECF No. 44). Respondents, in turn, filed a motion (ECF No. 46)
27 requesting a *nunc pro tunc* one-day extension of time. Montalvo opposed that motion
28 (ECF No. 47). The Court finds that Respondents have shown good cause for their one-

1 day late filing of the reply and excusable neglect for their failure to seek an extension of
2 time before the deadline; Respondents attribute both to a calendaring error. See LR IA 6-
3 1. The Court will grant the motion for extension of time, and will deny the motion to strike.

4 Montalvo also filed a motion for appointment of counsel on September 22, 2020
5 (ECF No. 34). Respondents filed an opposition to that motion (ECF No. 37), and Montalvo
6 replied (ECF No. 41). Montalvo has moved for appointment of counsel in the past (ECF
7 Nos. 1-3, 3, 14), and the Court has denied those motions (ECF Nos. 6, 16). "Indigent
8 state prisoners applying for habeas corpus relief are not entitled to appointed counsel
9 unless the circumstances of a particular case indicate that appointed counsel is
10 necessary to prevent due process violations." *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th
11 Cir. 1986) (citing *Kreiling v. Field*, 431 F.2d 638, 640 (9th Cir. 1970) (per curiam)). The
12 Court may, however, appoint counsel at any stage of the proceedings "if the interests of
13 justice so require." See 18 U.S.C. § 3006A; see also Rule 8(c), Rules Governing § 2254
14 Cases; *Chaney*, 801 F.2d at 1196. The Court determines that there no changed
15 circumstances warranting reconsideration of Montalvo's request for appointment of
16 counsel. The motion for appointment of counsel will be denied.

17 **III. DISCUSSION**

18 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted in 1996,
19 established a one-year statute of limitations for federal habeas petitions filed by prisoners
20 challenging state convictions or sentences; the statue provides:

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

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

25 (B) the date on which the impediment to filing an application
26 created by State action in violation of the Constitution or laws
of the United States is removed, if the applicant was
prevented from filing by such State action;

27 (C) the date on which the constitutional right asserted was
28 initially recognized by the Supreme Court, if the right has been

1 newly recognized by the Supreme Court and made
2 retroactively applicable to cases on collateral review; or

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

6 28 U.S.C. 2244(d)(1). The AEDPA statute of limitations is tolled during the time that a
7 properly filed application for state post-conviction or other collateral review is pending in
8 state court. See 28 U.S.C. § 2244(d)(2). A habeas petitioner is entitled to equitable tolling
9 of the AEDPA statute of limitations if the petitioner shows “(1) that he has been pursuing
10 his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and
11 prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v.*
12 *DiGuglielmo*, 544 U.S. 408, 418 (2005)); *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir.
13 2009).

14 In Montalvo’s case, the Nevada Court of Appeals entered its order affirming the
15 judgment of conviction on January 19, 2017. (ECF No. 28-5.) Montalvo did not seek
16 review in the United State Supreme Court, so his conviction became final and the AEDPA
17 limitations period began to run 90 days later, on April 19, 2017. See *Bowen v. Roe*, 188
18 F.3d 1157, 1158-59 (9th Cir. 1999) (holding that, when no petition for certiorari to the
19 United States Supreme Court is filed, direct review is considered to be final 90 days after
20 the decision of the state’s highest court).

21 Montalvo’s first state habeas petition, filed May 17, 2017 (ECF No. 28-11), tolled
22 the statute of limitations, under 28 U.S.C. § 2244(d)(2). 28 days ran against the limitations
23 period before Montalvo initiated that action, leaving 337 days of the limitations period.
24 Montalvo’s first state habeas action was completed on October 25, 2018, when the
25 Nevada Supreme Court’s remittitur was issued after that court’s affirmance of the denial
26 of relief. (ECF No. 29-27.) The statute of limitations then began to run again, and it ran
27 out 337 days later, on September 27, 2019. Montalvo did not meet the September 27,
28 2019, AEDPA statute of limitations deadline; Montalvo mailed his federal petition to the
 Court for filing on February 24, 2020.

1 Montalvo's second state habeas petition, filed October 12, 2018 (ECF No. 29-23),
2 was ruled by the Nevada Supreme Court to be untimely, successive, and procedurally
3 barred. (ECF No. 30-14.) That petition, therefore, did not qualify for statutory tolling of the
4 AEDPA statute of limitations under 28 U.S.C. § 2244(d)(2). *See Pace*, 544 U.S. at 413-17
5 (holding that if a post-conviction petition is untimely filed under state law, it is not "properly
6 filed" for the purposes of § 2244(d)(2) statutory tolling).

7 Montalvo argues that, because he initiated his second state habeas action before
8 the remittitur was issued on the appeal in his first state habeas action, the second state
9 habeas action should be considered a continuation of the first, or should otherwise qualify
10 for statutory tolling, perhaps under 28 U.S.C. § 2244(d)(2). (ECF No. 38 at 3-5.)
11 However, Montalvo cites no legal authority supporting such an approach, and the Court
12 knows of none. Montalvo's second—untimely filed—state habeas action did not toll the
13 AEDPA statute of limitations.

14 Moreover, Montalvo does not make any showing that equitable tolling is warranted.
15 He makes no colorable argument that any extraordinary circumstance stood in his way
16 and prevented timely filing of his federal petition, and he makes no colorable argument
17 that, with respect to his federal petition, he pursued his rights diligently. *See Holland*, 560
18 U.S. at 649; *Ramirez*, 571 F.3d at 997. The record reflects that Montalvo litigated his
19 second—procedurally barred—state habeas action between October 12, 2018, and
20 December 24, 2019. (See ECF Nos. 29-23, 29-27.) Montalvo provides no explanation
21 why he could not have filed his federal habeas petition during that time.

22 Montalvo also does not show an evidentiary hearing to be warranted. In his motion
23 for an evidentiary hearing (ECF No. 35), Montalvo requests an evidentiary hearing only
24 regarding the merits of his claims. He does not request an evidentiary hearing with respect
25 to any aspect of the application of the statute of limitations. There is no indication in the
26 record that Montalvo could present any evidence that could possibly entitle him to
27 equitable tolling.

28 //

1 Therefore, the Court will deny Montalvo's motion for evidentiary hearing and grant
2 Respondents' motion to dismiss on the ground that this action is barred by the statute of
3 limitations. The Court need not reach the other arguments asserted by Respondents in
4 their motion to dismiss.

5 **IV. CERTIFICATE OF APPEALABILITY**

6 The standard for the issuance of a certificate of appealability requires a "substantial
7 showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court
8 has interpreted 28 U.S.C. § 2253(c) as follows:

9 Where a district court has rejected the constitutional claims on the
10 merits, the showing required to satisfy § 2253(c) is straightforward: The
11 petitioner must demonstrate that reasonable jurists would find the district
12 court's assessment of the constitutional claims debatable or wrong. The
13 issue becomes somewhat more complicated where, as here, the district
14 court dismisses the petition based on procedural grounds. We hold as
15 follows: When the district court denies a habeas petition on procedural
16 grounds without reaching the prisoner's underlying constitutional claim, a
17 COA should issue when the prisoner shows, at least, that jurists of reason
18 would find it debatable whether the petition states a valid claim of the denial
19 of a constitutional right and that jurists of reason would find it debatable
20 whether the district court was correct in its procedural ruling.

21 Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also James v. Giles, 221 F.3d 1074,
22 1077-79 (9th Cir. 2000).

23 The Court finds that, applying the standard articulated in Slack, reasonable jurists
24 would not find debatable the Court's ruling that this action is barred by the statute of
25 limitations. The Court will deny Montalvo a certificate of appealability.

26 Notwithstanding the denial of a certificate of appealability by this Court, Montalvo
27 may still attempt to pursue an appeal by filing a timely notice of appeal in this action; if he
28 does so, the Ninth Circuit Court of Appeals will then determine whether a certificate of
appealability will be issued by that Court.

29 **V. CONCLUSION**

30 It is therefore ordered that Respondents' Motion for Enlargement of Time *Nunc Pro
31 Tunc* (ECF No. 46) is granted. Respondents' reply in support of their motion to dismiss
32 (ECF No. 43) is considered timely filed.

1 It is further ordered that Petitioner's Motion to Strike (ECF No. 44) is denied.

2 It is further ordered that Petitioner's Motion for Appointment of Counsel (ECF No.
3 34) is denied.

4 It is further ordered that Petitioner's Motion for Evidentiary Hearing (ECF No. 35)
5 is denied.

6 It is further ordered Respondents' Motion to Dismiss (ECF No. 17) is granted. This
7 action is dismissed, as barred by the statute of limitations.

8 It is further ordered that Petitioner is denied a certificate of appealability.

9 The Clerk of Court is directed to enter judgment accordingly and close this case.

10 DATED THIS 6th Day of January 2021.

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14 MIRANDA M. DU
15 CHIEF UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ELIAS G. MONTALVO,

Case No. 3:20-cv-00131-MMD-WGC

Petitioner,

ORDER

v.

ISIDRO BACA, *et al.*,

Respondents.

13 In this habeas corpus case, *pro se* Petitioner Elias G. Montalvo moves for
14 reconsideration of the dismissal of his action on statute of limitations grounds. (ECF No.
15 51.) The Court will deny the motion.

16 On January 6, 2021, the Court granted Respondents' motion to dismiss and
17 dismissed this action. (ECF No. 48.) Judgment was entered that same date. (ECF No.
18 49.) Petitioner filed his motion for reconsideration (ECF No. 51) on January 13, 2021.
19 Respondents filed an opposition to that motion (ECF No. 54), and Montalvo replied (ECF
20 No. 55).

21 Federal Rule of Civil Procedure 60(b) provides for relief from a judgment where
22 one or more of the following is shown: (1) mistake, inadvertence, surprise or excusable
23 neglect; (2) newly discovered evidence; (3) fraud, misrepresentation or misconduct by the
24 adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or
25 discharged; it is based on an earlier judgment that has been reversed or vacated; or
26 applying it prospectively is no longer equitable; (6) any other reason justifying relief. See
27 Fed. R. Civ. P. 60(b); *see also* LR 59-1(a). Motions for reconsideration are disfavored,
28 and a party making such a motion should not repeat arguments already presented unless

"Appendix C"

1 necessary to explain intervening law or argue new facts. See LR 59-1(b). The movant
2 must state with particularity the points of law or fact overlooked or misunderstood by the
3 court, or the changes in legal or factual circumstances that may entitle the movant to
4 relief. See LR 59-1(a).

5 Montalvo does not show that there was any mistake of law or fact made by the
6 Court, or that any other circumstance warrants reconsideration. Montalvo repeats his
7 argument, made in his opposition to the motion to dismiss, that his procedurally barred
8 second state habeas action should be considered a “continuation” of his first state habeas
9 action (ECF No. 51 at 2), but, as is explained in the order dismissing the action (ECF No.
10 48 at 5), the law does not support that approach. The remainder of Montalvo’s argument
11 is essentially that he proceeded *pro se* in his state habeas actions, and that he did not
12 understand the law, believing that he had to continue to exhaust his claims in state court,
13 in his second state habeas action, before proceeding with his federal petition. (See ECF
14 No. 51 at 2-6.) But a *pro se* petitioner’s confusion or ignorance of the law is not, itself, a
15 circumstance warranting equitable tolling. See *Rasberry v. Garcia*, 448 F.3d 1150, 1154
16 (9th Cir. 2006). The Court will deny Petitioner’s motion for reconsideration.

17 Notwithstanding the Court’s denial of a certificate of appealability (ECF No. 48 at
18 6), Montalvo may attempt to pursue an appeal by filing a timely notice of appeal in this
19 action in this Court; if he does so, the Ninth Circuit Court of Appeals will then determine
20 whether a certificate of appealability will be issued by that court.

21 It is therefore ordered that Petitioner’s Motion for Reconsideration (ECF No. 51) is
22 denied.

23 DATED THIS 1st Day of February 2021.

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26 MIRANDA M. DU
27 CHIEF UNITED STATES DISTRICT JUDGE
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