

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEP 30 2022

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

MICHAEL L. ZILIAK,

Petitioner-Appellant,

v.

JAMES KEY,

Respondent-Appellee.

No. 22-35060

D.C. No. 2:21-cv-00257-TOR  
Eastern District of Washington,  
Spokane

ORDER

Before: CLIFTON and VANDYKE, Circuit Judges.

The request for a certificate of appealability 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).

Any pending motions are denied as moot.

**DENIED.**

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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 MICHAEL L. ZILIAK,

8 Petitioner,

9 v.

10 JAMES KEY,

11 Respondent.

NO. 2:21-CV-0257-TOR

ORDER DENYING PETITIONER'S  
WRIT OF HABEAS CORPUS

12 BEFORE THE COURT is Petitioner Michael L. Ziliak's Petition for Writ of  
13 Habeas Corpus. ECF No. 1. Petitioner, a prisoner at Airway Heights Corrections  
14 Center, is proceeding *pro se*. Assistant Attorney General Keith A. Hines  
15 represents Respondent. Respondent has answered the Petition and filed relevant  
16 portions of the state court record. ECF Nos. 5, 6. Although given the opportunity  
17 to file a Reply, Petitioner has not timely filed anything in reply to Respondent's  
18 Answer. The Court has reviewed the record and files herein and is fully informed.  
19 For the reasons discussed below, Michael L. Ziliak's Petition for Writ of Habeas  
20 Corpus (ECF No. 1) is **DENIED**.

## 1 BACKGROUND

2 On June 18, 2019, Ziliak pled guilty to rape of a child in the second degree  
3 and sexual exploitation of a minor in the Asotin County Superior Court. ECF No.  
4 6-1 at 16-25. On November 18, 2019, the trial court sentenced Ziliak to 120-  
5 months to life in prison for rape of a child second degree and to a concurrent 55-  
6 months in prison for sexual exploitation of a minor. ECF No. 6-1 at 2-11. On  
7 November 13, 2020, Ziliak mailed<sup>1</sup> a “Motion for Order re: Motion to Vacate  
8 Judgment and Sentence with Prejudice” to the Asotin County Superior Court. ECF  
9 No. 6-1 at 29. On November 19, 2020, the Asotin County Superior Court filed  
10 Ziliak’s motion. ECF No. 6-1 at 31-33. Ziliak presented the following issues:

- 11 1. The fact that my attorney did not inform me that I had a credible  
12 defense.
- 13 2. The fact that my attorney had me plead guilty before my psychological  
14 assessment.
- 15 3. The fact that the prosecuting attorney delayed my psychological  
16 assessment, possibly along with my own attorney, possibly causing an  
17 unfair report.

18 *Id.* at 32.

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<sup>1</sup> Under the “prison mailbox rule” of *Houston v. Lack*, 487 U.S. 266 (1988), a  
20 document may be construed as filed on the date it was submitted to prison  
authorities for mailing.

The trial court found Ziliak’s motion was timely, declined to grant relief, and transferred the case to the Washington Court of Appeals for consideration as a personal restraint petition. ECF No. 6-1 at 46. On March 19, 2021, the Court of Appeals dismissed the petition. ECF No. 6-1 at 48-51. Ziliak sought discretionary review by the Washington Supreme Court. ECF No. 6-1 at 53-67. Ziliak sought discretionary review as to whether he received ineffective assistance of counsel in deciding to plead guilty. *Id.*

The Washington Supreme Court Deputy Commissioner denied review on May 3, 2021. ECF No. 6-1 at 109-111. On June 23, 2021, the Washington Court of Appeals issued a certificate of finality declaring the Order Dismissing Personal Restraint Petition became final on June 2, 2021. ECF No. 6-1 at 113.

Petitioner filed this federal 28 U.S.C. § 2254 habeas petition (ECF No. 1) on August 27, 2021 (mailed August 26, 2021, ECF No. 1-1), alleging ineffective assistance of counsel.

Respondent contends the Petition is barred under the statute of limitations, 28 U.S.C. § 2244(d). ECF No. 5 at 6-9.

## DISCUSSION

## **I. Statute of Limitation**

Pursuant to 28 U.S.C. § 2244(d)(1), a one-year statute of limitations applies to § 2254 habeas actions. That period of limitation runs from the latest of:

- 1 (A) the date on which the judgment became final by the conclusion of  
2 direct review or the expiration of the time for seeking such review;
- 3 (B) the date on which the impediment to filing an application created by  
4 State action in violation of the Constitution or laws of the United States is  
5 removed, if the applicant was prevented from filing by such State action;
- 6 (C) the date on which the constitutional right asserted was initially  
7 recognized by the Supreme Court, if the right has been newly recognized  
8 by the Supreme Court and made retroactively applicable to cases on  
9 collateral review; or
- 10 (D) the date on which the factual predicate of the claim or claims  
11 presented could have been discovered through the exercise of due  
12 diligence.

13 28 U.S.C. § 2244(d)(1). The period of limitation usually commences when the  
14 criminal judgment becomes final under state law; specifically “the date on which  
15 the judgment became final by the conclusion of direct review or the expiration of  
16 the time for seeking such review[.]” § 2244(d)(1)(A).

17 In this case, petitioner does not establish his entitlement to application of  
18 § 2244(d)(1)(B), (C), or (D) to his case. Accordingly, the statute of limitations in  
19 this case began to run on the date on which the judgment became final under  
20 § 2244(d)(1)(A).

21 In Washington, a notice of appeal must be filed within thirty-days after entry  
22 of the decision of the trial court. Wash. RAP 5.2(a). The end of this thirty-day  
23 period marks the expiration of the time for seeking review pursuant to  
24 § 2244(d)(1)(A). Here, because petitioner did not appeal the November 18, 2019

1 judgment and sentence, his conviction became final thirty-days later, on December  
2 18, 2019. His one-year statute of limitations under § 2244(d)(1) began to run the  
3 following day, on December 19, 2019, *Patterson v. Stewart*, 251 F.3d 1243, 1246-  
4 47 (9th Cir. 2001), and expired one-year later, on December 20, 2020. Petitioner  
5 mailed his habeas petition on August 26, 2021, more than one-year after his  
6 conviction became final, after excluding the time during which his state petition  
7 was pending. His habeas petition is therefore untimely and subject to dismissal.

8 The one-year limitations period for filing a § 2254 action is tolled for any  
9 “properly filed” collateral state challenge to the pertinent judgment or claim. 28  
10 U.S.C. § 2244(d)(2). However, the time period to file a petition for *certiorari*  
11 before the United States Supreme Court to review the denial of a post-conviction  
12 collateral challenge does not toll the statute of limitations. *Lawrence v. Fla.*, 549  
13 U.S. 327 (2007). Petitioner mailed a post-conviction collateral challenge, through  
14 a CrR 7.8 motion, on November 13, 2020, leaving 36-days untolled from the one-  
15 year statute of limitation.

16 After the Washington Supreme Court denied review, the certificate of  
17 finality was issued by the Washington Court of Appeals on June 23, 2021,  
18 effective June 2, 2021. At least another 64-days expired before Petitioner mailed  
19 his habeas petition to this court. Petitioner is not entitled to any statutory tolling  
20 under § 2244(d)(2) for this 64-day period.

1       The statute of limitations is subject to equitable tolling. *Holland v. Florida*,  
2 560 U.S. 631, 645 (2010). Equitable tolling is available “only when extraordinary  
3 circumstances beyond a prisoner’s control make it impossible to file a petition on  
4 time and the extraordinary circumstances were the cause of his untimeliness.” To  
5 be entitled to equitable tolling, a petitioner must show “ ‘(1) that he has been  
6 pursuing his rights diligently, and (2) that some extraordinary circumstance stood  
7 in his way’ and prevented timely filing.” *Holland*, 560 U.S. at 649 (quoting *Pace*  
8 *v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). In other words, equitable tolling may  
9 be appropriate when external forces, rather than petitioner’s lack of diligence,  
10 prevent timely filing. *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).  
11 Petitioner does not, however, provide any support for or demonstrate any  
12 entitlement to equitable tolling.

## 13       **II. Conclusion**

14       Based on the foregoing, this Court finds that Petitioner’s habeas petition was  
15 filed beyond the one-year statute of limitation and must be dismissed.

## 16       **III. Certificate of Appealability**

17       A petitioner seeking post-conviction relief under section 2254 may appeal a  
18 district court’s dismissal of his federal habeas petition only after obtaining a  
19 certificate of appealability (COA) from a district or circuit judge. A COA may  
20 issue only where a petitioner has made “a substantial showing of the denial of a

1 constitutional right.” See 28 U.S.C. § 2253(c)(2). A petitioner satisfies this  
2 standard “by demonstrating that jurists of reason could disagree with the district  
3 court’s resolution of his constitutional claims or that jurists could conclude the  
4 issues presented are adequate to deserve encouragement to proceed further.”  
5 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

6 This Court concludes that Petitioner is not entitled to a COA because he has  
7 not demonstrated that jurists of reason could disagree with this Court’s resolution  
8 or could conclude that any issue presented deserves encouragement to proceed  
9 further.

10 **ACCORDINGLY, IT IS HEREBY ORDERED:**

11 1. Petitioner’s Petition for Writ of Habeas Corpus (ECF No. 1) is **DENIED**.  
12 2. Any appeal taken by Petitioner of this matter would not be taken in good  
13 faith as he fails to make a substantial showing of the denial of a  
14 constitutional right. Accordingly, a certificate of appealability is denied.

15 The District Court Executive is directed to enter this Order and Judgment  
16 accordingly, furnish copies to the parties, and **CLOSE** the file.

17 DATED December 10, 2021.



18 A handwritten signature in black ink, appearing to read "Thomas O. Rice".  
19 THOMAS O. RICE  
20 United States District Judge