UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RONALD BUZZARD, JR, Petitioner, v. PATRICK GLEBE, Respondent.	CASE NO. C14-1663 MJP ORDER ADOPTING REPORT AND RECOMMENDATION

THIS MATTER comes before the Court on Petitioner Ronald Buzzard Jr.'s Objections, (Dkt. No. 38), to the Report and Recommendation of the Honorable James P. Donohue, United States Magistrate Judge. (Dkt. No. 36.) Having reviewed the Report and Recommendation, Petitioner's Objections, and all related papers, the Court ADOPTS the Report and Recommendation. Petitioner's habeas petition is DENIED as untimely and this case is DISMISSED with prejudice.

Background

Petitioner seeks Section 2254 habeas relief from his 2002 Washington State conviction for first degree rape of a child. (Dkt. Nos. 10, 21.) The Report and Recommendation ("R&R")

summarizes the relevant facts and the procedural history of Petitioner's criminal case. (Dkt. No. 36 at 2–6.) The Court does not repeat them here.

In the R&R, Judge Donohue recommended this Court deny Petitioner's habeas petition and deny the issuance of a certificate of appealability on the grounds that the habeas petition is untimely. (Id. at 11.) Petitioner objects to Judge Donohue's R&R on the grounds that (1) any procedural default should be excused based on the Supreme Court's decision in Martinez v. Ryan, 132 S. Ct. 1309 (2012); (2) facts from his plea and sentencing hearing transcripts constitute newly discovered evidence excluding his claims from AEDPA's one-year time bar; and (3) that personal restraint petitions ("PRPs") that he filed in state court tolled the limitations period. (Dkt. No. 38.)

Discussion

A. Legal Standard

Under Federal Rule of Civil Procedure 72, the district judge must resolve de novo any part of the Magistrate Judge's R&R that has been properly objected to and may accept, reject, or modify the recommended disposition. Fed. R. Civ. P. 72(b)(3); See also 28 U.S.C. § 636(b)(1).

B. Petitioner's Objections to the R&R

Petitioner first argues any procedural default should be excused based on the Supreme Court's decision in Martinez v. Ryan, 132 S. Ct. 1309 (2012). (Dkt. No. 38 at 1–3.) In Martinez, the Supreme Court held that "inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel." Id. at 1315. Here, however, Judge Donohue recommended this Court deny Petitioner's habeas petition as untimely; not that the Court deny the petition on the grounds that Petitioner failed to raise his ineffective assistance of counsel claim in state

collateral proceedings. (Dkt. No. 36.) Martinez does not excuse the untimeliness of Petitioner's habeas petition.

Petitioner also argues that facts from his plea and sentencing hearing transcripts constitute newly discovered evidence excluding his claims from the one-year time bar. (Dkt. No. 38 at 3.) Judge Donohue adequately addressed this argument and found "[t]he facts and legal issues supporting petitioner's claims were available as early as May 3, 2005, when the judgment and sentence became final on direct review" and that "[p]etitioner could have raised the claims within the AEDPA statute of limitations, but he failed to do so." (Dkt. No. 36 at 11.) Petitioner's objection to the R&R fails to point out any error in the R&R.

Finally, Petitioner argues that the PRPs he filed in state court tolled the limitations period. (Dkt. No. 38 at 3.) Judge Donohue adequately addressed this argument and found that "[e]ven assuming arguendo, however, that the 2003 PRP and/or the 2005 motion did toll the statutory limitations period . . . state post-conviction or other collateral review would still have been completed by no later than February 7, 2006" and that Petitioner's federal habeas petition would still be untimely. (Dkt. No. 36 at 9.) Petitioner's objection to the R&R fails to point out any error in the R&R.

Conclusion

The Court ADOPTS the Report and Recommendation. Petitioner's habeas petition is DENIED as untimely and this case is DISMISSED with prejudice. In accordance with Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, a certificate of appealability is DENIED with respect to the Court's determination that Petitioner's habeas petition is time-barred.

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The clerk is ordered to provide copies of this order to all counsel and to Petitioner.

Dated this 15th day of October, 2015.

Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RONALD BUZZARD, JR.,

Petitioner,

v.

PATRICK GLEBE,

Respondent.

NO. C14-1663-MJP-JPD

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner, a state inmate at Stafford Creek Corrections Center in Aberdeen, Washington, is proceeding *pro se* and *in forma pauperis* in this habeas action pursuant to 28 U.S.C. § 2254. Specifically, petitioner is challenging his 2002 conviction in King County Superior Court for first degree rape of a child. Dkt. 10 (original habeas petition); Dkt. 21 (amended habeas petition).[1] Respondent has filed an answer contending that the habeas petition should be dismissed as untimely under 28 U.S.C. § 2244(d), and the petitioner has replied to the respondent's answer. Dkt. 27; Dkt. 34. After careful consideration of the briefs,

[1] Petitioner was sentenced on October 11, 2002 to a minimum term of 123 months to life under the Special Sexual Offender Sentencing Alternative (SSOSA). Dkt. 28, Ex. 1 (judgment and sentence).

the governing authorities and the balance of the record, the Court recommends that petitioner's amended habeas petition, Dkt. 21, be DENIED as untimely, and this case be DISMISSED with prejudice.

II. FACTS AND PROCEDURAL HISTORY

A. Petitioner's Commitment Offense and Sentencing

On direct review, the Washington State Court of Appeals summarized the circumstances of petitioner's conviction, sentencing, and subsequent SSOSA revocation as follows:

> [Ronald] Buzzard was accused of molesting his six year old niece and pleaded guilty to first degree rape of a child. On October 11, 2002, the court imposed a standard range sentence of 123 months, which it suspended under a Special Sexual Offender Sentencing Alternative (SSOSA) on condition that Buzzard undergo sex offender treatment for three years.
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> In January 2003, Buzzard took a polygraph as part of his treatment program. He admitted violating several conditions of his program. On January 25, 2003, Buzzard's community corrections officer filed a notice of violation with the court listing six separate violations. On February 4, the prosecutor sent Buzzard a "Notice of Sentence Violation Hearing and Motion to Show Cause." However, this notice listed only the first three of the six reasons given by the community corrections officer. On February 17, Buzzard's treatment provider formally terminated him from its program. The matter was set for hearing on February 18, 2003 and Buzzard appeared with counsel. The State indicated it had additionally received notice that Buzzard had been terminated from his treatment program. Buzzard moved for a continuance to arrange alternative treatment. The court granted the motion and reset the matter for March 11.
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> On March 11, different counsel appeared and requested an additional continuance because Buzzard's assigned counsel was ill. The court granted the continuance and reset the matter for April 11. On March 21, the community corrections officer submitted a supplemental notice of violation, adding the termination of Buzzard's treatment program as a reason for revoking the SSOSA.
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> Because of scheduling difficulties, the matter was not heard again until April 21. Counsel admitted all the allegations but gave explanations for each. She also presented information from Claudette Atuna, a sex offender treatment provider. Ms. Atuna indicated she was interested in providing treatment to Buzzard if he was ready to engage in it. The State

> objected to this proposal on a number of grounds, pointing out, among other things, that Atuna had never met or interviewed Buzzard and had not contacted his prior treatment provider. Defense counsel indicated Buzzard did not have the funds for an evaluation by Atuna and that "the only way to do that is to continue the matter probably for a few months." Counsel recommended that Buzzard be released to allow treatment with Atuna or that Buzzard be given time to seek funding.
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> The court indicated that it thought the proposal for treatment with Atuna was deficient and that it had "lost confidence" in its initial determination that Buzzard was amenable to treatment. It denied the motion for a continuance and revoked the SSOSA on the basis of all seven of the allegations set out by the community corrections officer.

Dkt. 28, Ex. 11.

B. Direct Review

Buzzard appealed to the Washington State Court of Appeals through counsel, arguing that the trial court abused its discretion when it denied Buzzard's request for a continuance so he could be evaluated by Ms. Atuna. *Id.*, Ex. 7. Proceeding *pro se*, he also filed a Statement of Additional Grounds for Review, in which he raised the following additional legal issues: (1) ineffective assistance of counsel at his April 21, 2003 revocation hearing, (2) violation of his due process rights because he did not receive written notice for four of the seven alleged probation violations, (3) insufficient evidence or witnesses to prove that Buzzard actually committed the alleged probation violations, and (4) deprivation of his constitutional right to confront and cross examine witnesses. *Id.*, Ex. 9.

On February 19, 2004, the Commissioner of the Court of Appeals granted the State's motion to affirm the Superior Court's decision revoking Buzzard's SSOSA, concluding that petitioner had not shown that the trial court abused its discretion or that his additional grounds merited relief. *Id.*, Ex. 11. On February 26, 2004, petitioner filed a motion to modify the Commissioner's ruling. *Id.*, Ex. 12. The Court of Appeals denied that motion on May 4, 2004. *Id.*, Ex. 13.

On June 10, 2004, petitioner sought discretionary review by the Washington Supreme Court. His petition raised six grounds for review, all substantially similar to the issues raised

at the Court of Appeals, with the additional argument that his appellate counsel was ineffective. *Id.*, Ex. 14. On February 1, 2005, the Washington Supreme Court denied review without comment. *Id.*, Ex. 15. Petitioner did not file a petition for writ of certiorari with the United States Supreme Court within the allotted 90-day time period; thus, the time for seeking final review under 28 U.S.C. § 2244(d)(1)(A) expired on May 2, 2005.[2]

C. State Collateral Review

Petitioner filed seven post-conviction motions and/or personal restraint petitions ("PRP") during and after the direct review process. Specifically, in 2003 he filed a motion to withdraw his guilty plea, which was construed as a PRP.[3] *Id.*, Exs. 24-31, 69-78. In 2005, he filed a motion challenging the denial of time credits. Dkt. 27 at 5; Dkt. 28, Exs. 36-37. In 2009, he filed two post-conviction motions[4] that the Court of Appeals construed as PRPs. Dkt. 28, Exs. 38-52. Moreover, in 2012, 2013, and 2014, he filed PRPs substantially similar to the 2009 PRP. *Id.*, Exs. 53-68.

Petitioner's 2003 PRP was ultimately denied as untimely. *Id.*, Exs. 29, 31. His 2005 motion was considered a time credit collateral challenge and was denied. Dkt. 27 at 5; Dkt.

[2] Petitioner filed a motion to stay issuance of the mandate with the Court of Appeals on February 25, 2005, arguing that his direct appeal was still ongoing because he had filed motions in conjunction with a petition for a writ of *coram nobis* in King County Superior Court. *Id.*, Ex. 16. The Commissioner denied the request, on the basis that the writ of *coram nobis* was abolished in Washington, CR 60(d). *Id.*, Ex. 17. The Court of Appeals denied petitioner's motion to modify the Commissioner's ruling. *Id.*, Ex. 19. The Washington Supreme Court denied petitioner's motion for discretionary review, holding that the mandate was proper, despite the fact that petitioner had another case pending. *Id.*, Ex. 22. Subsequently, the Court of Appeals issued its mandate on January 24, 2006, ruling that the Commissioner's February 19, 2004 "decision terminat[ed the] review of this court." *Id.*, Ex. 23.

[3] In an unrelated matter, while direct review was still pending in 2004, petitioner's appeal of a Superior Court order "denying a post-conviction motion" was denied due to his failure to pay the required filing fee. Dkt. 27 at 5; Dkt. 28, Ex. 32 at 1-2. This matter does not affect statutory tolling.

[4] Specifically, petitioner filed a Motion for Order Granting CrR 7.8 Motion to Modify J&S, and a Motion for Credit of Time Served Due to Significant Change in the Law. Dkt. 28, Exs. 38-39.

28, Ex. 37. Petitioner's 2009, 2012, and 2013 PRPs were all dismissed as time-barred under RCW 10.73.090.[5] Dkt. 28, Exs. 49, 56, 63.

D. Federal Collateral Review

On April 10, 2015, petitioner filed the instant amended § 2254 petition for a writ of habeas corpus.[6] Dkt. 21. Petitioner's federal habeas petition raises the following three grounds for relief:

(1) Petitioner's due process rights were violated when he did not receive the agreed-to 93-123 months "total actual confinement" sentence in his plea agreement.

(2) The trial court erroneously applied law with an effective date of March 27, 2002, when petitioner committed his offense between December 2001 and March 26, 2002.

(3) Petitioner was not informed of the mandatory parole term or the ISRB's jurisdiction over petitioner for the remainder of his life.

Id. at 5.

On May 27, 2015, respondent filed an Answer arguing that the habeas petition is untimely under 28 U.S.C. § 2244(d) because more than one year of untolled time passed between the date his judgment and sentence became final and the date he filed his federal habeas petition. Dkt. 27 at 11.[7] Respondent further argues that petitioner is not entitled to equitable tolling of the statute, as there is nothing new about his federal habeas claims, and he "does not satisfy the heavy burden" to show any "extraordinary circumstances" that stood in the way of his filing a timely habeas petition in 2006 or 2007. *Id.* at 13.

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[5] According to petitioner's reply to respondent's answer, the Washington Supreme Court recently finalized petitioner's 2014 PRP, although the Court does not have a copy. Dkt. 34 at 3; Dkt. 28, Exs. 66-68.

[6] The original Petition for Writ of Habeas Corpus was filed on January 6, 2015. The Amended Petition was filed on April 10, 2015.

[7] Respondent also points out that petitioner failed to exhaust his three claims "because he did not fairly present the claims to the Washington Supreme Court in a timely manner." *Id.* at 13-14. "[T]he claims are now procedurally barred under state law," *id.* at 15, because petitioner did not raise the claims on direct review or within one year of the date on which his judgment and sentence became final, RCW 10.73.090. To obtain review of this claim, petitioner would need to demonstrate (1) cause and prejudice for his default in state court or (2) that he is actually innocent of the underlying criminal charges. Dkt. 27 at 15.

Petitioner replies that he was "[never] given the [required] notice of the possibility of a life sentence on the record at his plea . . . or sentencing" hearings. Dkt. 34 at 2. He argues the transcripts from these hearings constitute "newly discovered evidence" such that the trial court's failure to notify "creates an exemption to the one-year time bar." *Id.* at 2, 4. Petitioner further contends that his judgment and sentence is "invalid on its face, bypassing the one-year time bar under RCW 10.73.090(1)" because he was not released on his "plead to release date of [March 17, 2011]." *Id.* at 2. Finally, petitioner asserts that his plea agreement was "involuntary because he was not told and did not know about the minimum term sentence, or mandatory parole term," or that as a consequence of his plea he would be "under the [ISRB's] jurisdiction for life." Dkt. 21 at 13.[8]

III. DISCUSSION

A. Petitioner's Habeas Petition is Time-Barred.

1. AEDPA's One-Year Statute of Limitations Has Expired.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), requires a state prisoner seeking federal habeas relief to file his federal petition within one year of the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C § 2244(d)(1)(A); *Jimenez v. Quarterman*, 555 U.S. 113, 129 S. Ct. 681, 685 (2009). The United States Supreme Court has rejected the argument that the AEDPA "limitations period 'starts to run on the date the court of appeals issues its mandate.'" *Gonzales v. Thaler*, 565 U.S. __, 132 S. Ct. 641, 653 (2012) (quoting *Clay v. United States*, 537 U.S. 522, 529 (2003)). Instead, if a petitioner does not seek certiorari, the AEDPA-limitations period starts to run on the date when the ability to file a petition for certiorari expires. *See id.*

The one-year statute of limitations period does not include the time during which a "properly filed" application for state collateral review is "pending" in the state courts. 28

[8] Petitioner incorporates this argument by reference in his Reply to Respondent's Answer. Dkt. 34 at 9.

U.S.C § 2244(d)(2). "Pending" generally includes the time between a lower state court's decision and the filing of a notice of appeal to a higher state court. *See Carey v. Saffold*, 536 U.S. 214, 220 (2002) (holding that "until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending'"). AEDPA's statute of limitations "is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed, since no case is 'pending' during that interval." *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). In addition, if a state court determines that a collateral challenge was not timely filed under state law, the collateral challenge is not "properly filed" for purposes of 28 U.S.C. § 2244(d)(2) and therefore AEDPA's statute of limitations is not tolled. In other words, "[w]hen 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) (second alteration in original) (quoting *Carey*, 536 U.S. at 226).

As discussed in detail above, the Washington Supreme Court denied petitioner's request for discretionary review of the King County Superior Court order revoking his SSOSA on February 1, 2005. Dkt. 28, Ex. 15. Petitioner had 90 days—until May 2, 2005—to file a petition for certiorari with the United States Supreme Court. *See* Sup. Ct. R. 13 (a petition for a writ of certiorari "is timely when it is filed . . . within 90 days after entry of the judgment"). When petitioner failed to file for certiorari, the judgment became final on May 3, 2005, "the expiration of the time for seeking [direct] review." 28 U.S.C. § 2244(d)(1)(A); *see also Gonzales*, 132 S. Ct. at 653.

Petitioner's motion to withdraw his guilty plea that was construed as a PRP by the Court of Appeals in 2003 was ultimately dismissed as untimely by the Washington Supreme Court. *See* Dkt. 28, Ex. 29 (holding that petitioner's procedural claims were not "exempt from the one-year time limit on collateral attack," and it was not timely because petitioner filed his PRP "more than one year after his judgment and sentence became final"). Consequently, this

PRP did not toll the statute of limitations because it was not "properly filed" for purposes of 28 U.S.C § 2244(d). *See Pace*, 544 U.S. at 413 (providing that "time limits on postconviction petitions are 'condition[s] to filing,' such that an untimely petition would not be deemed 'properly filed.'"). Additionally, although petitioner filed a motion on August 29, 2005, "challenging the denial of time credits," the Court of Appeals dismissed the action on January 6, 2006. Dkt. 27 at 5; Dkt. 28, Exs. 36-37. In its Order of Dismissal, the court declared that petitioner's "[u]nsupported assertions and conclusory allegations [we]re not sufficient, by themselves, to warrant relief in a personal restraint proceeding," and thus, petitioner did not "state[] grounds upon which relief c[ould] be granted by way of a [PRP]." Dkt. 28, Ex. 37. Thus, it is not clear that either the 2003 PRP or the 2005 motion were "properly filed application[s] for State post-conviction or other collateral review" that would toll the AEDPA limitation period for any period of time. 28 U.S.C. § 2244(d)(2). Accordingly, the statute of limitations ran from the date the judgment became final at the expiration of the time for seeking review—May 3, 2005—and expired on May 3, 2006.

In addition, it bears mentioning that petitioner is not entitled to statutory tolling for the period beginning in 2009 when the Superior Court transferred his post-conviction motions to the Court of Appeals to be considered as PRPs. These motions did not constitute "properly filed" collateral challenges for purposes of 28 U.S.C § 2244(d), as the Court of Appeals expressly determined that petitioner's 2009 PRPs were untimely as a matter of state law. Dkt. 28, Ex. 46 ("Since it is clear that at least one of Buzzard's claims is time barred [under RCW 10.73.090], the entire petition must be dismissed."). *See Pace*, 544 U.S. at 414; *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, [and] the time limits upon its

delivery[.]"). Similarly, the Commissioner of the Supreme Court determined that the PRPs filed in 2012 and 2013 were also time-barred.[9] Dkt. 28, Exs. 56, 63.

Even assuming *arguendo*, however, that the 2003 PRP and/or the 2005 motion did toll the statutory limitations period, "properly filed . . . State post-conviction or other collateral review" would have still been completed by no later than February 7, 2006.[10] 28 U.S.C. § 2244(d)(2). Specifically, at the time the 2005 motion became final, there were no other PRPs pending in the state courts, and the statute of limitations would have run from February 7, 2006 until it expired on February 7, 2007. Thus, under either analysis, several years of untolled time passed before petitioner submitted PRPs in 2009. Petitioner's federal habeas petition is therefore untimely.

2. There Is No Basis to Apply Equitable Tolling.

The statute of limitations is subject to equitable tolling when principles of equity would make the rigid application of a limitation period unfair. *Miller v. New Jersey State Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998). "Equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." *Calderon v. United States District Court for the Cent. Dist. Of Cal.*, 128 F.3d 1283, 1287 (9th Cir. 1997); *see also Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009). Specifically, in order to receive equitable tolling, a petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 418.

Petitioner states that facts from his plea and sentencing hearing transcripts "prove 'newly discovered evidence' under RCW 10.73.100(1)" so his claims should be exempt from

[9] Although petitioner's reply to respondent's answer indicates that the Washington Supreme Court recently finalized petitioner's 2014 PRP, the Court does not have a copy and presumes that it was time-barred as well. Dkt. 34 at 3; Dkt. 28, Exs. 66-68.

[10] The Court of Appeals entered an Order of Dismissal on January 6, 2006, from which petitioner did not seek review to the Washington Supreme Court in the permitted 30-day time frame. *See* RAP 5.2(a) (notice of appeal must be filed no later than 30 days after entry of judgment).

the one-year time bar. Dkt. 34 at 1. Moreover, petitioner contends that his judgment and sentence is "invalid on its face" because he was not released on his "plead to release date of [March 17, 2011]." *Id.* at 2. Lastly, petitioner asserts that the trial court's failure to inform him of the mandatory parole term that accompanied his sentence "makes his plea involuntary, . . . [which] makes his [judgment and sentencing] 'invalid on its face,' bypassing the one-year time bar." Dkt. 21 at 11-12.[11]

Here, petitioner has not asserted any extraordinary circumstances beyond his control that explain his failure to file his habeas petition within the one-year statute of limitations period. Furthermore, no such evidence is apparent from the Court's review of the record. *See Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009) (an external force must cause the untimeliness, and thus, mere oversight, miscalculation or negligence on the petitioner's part would preclude the application of equitable tolling); *Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1061 (9th Cir. 2007) ("[a] petitioner must show that his untimeliness was caused by an external impediment and not by his own lack of diligence").

Moreover, 2013 decisions of the Court of Appeals and the Washington Supreme Court demonstrate that petitioner's claims lack merit. Dkt. 28, Exs. 55-56. Specifically, the Court of Appeals found that the plea agreement not only "expressly notified [petitioner] that the 123 month sentence . . . was a minimum term," but it also specified that the ISRB could extend that term "upon its determination." *Id.*, Ex. 55. The Commissioner of the Supreme Court found that petitioner made "no effort to demonstrate facial invalidity," and that even if his plea were involuntary, "involuntariness of a guilty plea is not itself an exempt ground for relief under RCW 10.73.100." *Id.*, Ex. 56. The Commissioner concluded his ruling by stating that petitioner's "argument is meritless in any event" because the "plea agreement plainly stated that [petitioner] would be subject to indeterminate sentencing," and "the State did not promise [petitioner that he] would spend only 123 months in prison." *Id.*

[11] Incorporated by reference in Petitioner's Reply to Respondent's Answer. Dkt. 34 at 9.

The facts and legal issues supporting petitioner's claims were available as early as May 3, 2005, when the judgment and sentence became final on direct review. Petitioner could have raised the claims within the AEDPA statute of limitations, but he failed to do so. This does not constitute "'extraordinary circumstances' beyond [petitioner's] control." *Calderon*, 128 F.3d at 1287. Therefore, petitioner has not met the burden necessary to apply equitable tolling in this instance.

Because the federal habeas petition was filed after expiration of AEDPA's statute of limitations, and because no evidence justifies statutory or equitable tolling, petitioner's federal habeas petition should be dismissed as time-barred under 28 U.S.C. § 2244(d)(1). Consequently, it is not necessary to address the underlying substance of petitioner's arguments.

B. Certificate of Appealability

A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a certificate of appealability from a district or circuit judge. A certificate of appealability may issue only where a petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that petitioner is not entitled to a certificate of appealability with respect to the Court's determination that petitioner's habeas petition is untimely.

IV. CONCLUSION

For the foregoing reasons, the Court recommends that petitioner's habeas petition, Dkt. 21, be DENIED as untimely, and this case be DISMISSED with prejudice. A proposed order accompanies this Report and Recommendation.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit by no later than **July 23, 2015**. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motion calendar for the third Friday after they are filed. Responses to objections may be filed within **fourteen (14)** days after service of objections. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **July 24, 2015.**

This Report and Recommendation is not an appealable order. Thus, a notice of appeal seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the assigned District Judge acts on this Report and Recommendation.

DATED this 2nd day of July, 2015.

JAMES P. DONOHUE
Chief United States Magistrate Judge