

MAR 16 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OMAR LOPEZ-CASTILLO,  
  
Petitioner - Appellant,

v.

PAT GLEBE,  
  
Respondent - Appellee.

No. 10-35441

D.C. No. 2:08-cv-01598-JLR

MEMORANDUM\*

Appeal from the United States District Court  
for the Western District of Washington  
James L. Robart, District Judge, Presiding

Argued and Submitted March 10, 2011  
Seattle, Washington

Before: FISHER, GOULD, and TALLMAN, Circuit Judges.

Omar Lopez-Castillo appeals the district court's dismissal of his 28 U.S.C. § 2254 petition for a writ of habeas corpus as untimely. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

We reject Lopez-Castillo's argument that the burden was on Respondent to show that Lopez-Castillo was not entitled to equitable tolling. Rather, Lopez-Castillo had the burden to establish two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Holland v. Florida*, 560 U.S. \_\_\_, 130 S. Ct. 2549, 2562 (2010); *Mendoza v. Carey*, 449 F.3d 1065, 1068 (9th Cir. 2006).

It was not an abuse of discretion for the district court to deny an evidentiary hearing on the issue of Lopez-Castillo's entitlement to equitable tolling, and the district court properly dismissed the petition as untimely under 28 U.S.C. § 2244(d). Lopez-Castillo did not adequately allege that he acted with the requisite diligence in pursuing his rights, nor did he offer to bring forward sufficient evidence of diligence in response to the magistrate judge's specific inquiry about what evidence he would present if granted a hearing. *See Bills v. Clark*, 628 F.3d 1092, 1100–01 (9th Cir. 2010); *Mendoza*, 449 F.3d at 1069–71 & n.6.

**AFFIRMED.**