

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50164
USDC No. 6:13-CV-105



A True Copy
Certified order issued Nov 27, 2017

Stacy W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

GARY DEWAYNE OATMAN,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas

ORDER:

Gary Dewayne Oatman, Texas prisoner # 01599836, was convicted of aggravated assault with a deadly weapon and sentenced to an enhanced sentence of 70 years of imprisonment. He now requests a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition on the merits. He requests a COA with respect to his claims that (1) he was unconstitutionally sentenced as a habitual offender, (2) he received constitutionally deficient notice of the habitual offender enhancement, (3) he received ineffective assistance based on counsel's failure to challenge the habitual offender enhancement, and (4) he was denied the opportunity to conduct discovery or develop his claims.

Appendix ~ E

No. 17-50164

To obtain a COA, a § 2254 petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “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).

Oatman has not made the requisite showing. *See id.* Accordingly, his motion for a COA is DENIED. His motion for appointment of counsel is also DENIED.

/s/ Jacques L. Wiener, Jr.

JACQUES L. WIENER, JR.
UNITED STATES CIRCUIT JUDGE

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No. 17-50164

GARY DEWAYNE OATMAN,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before SMITH, WIENER, and HAYNES, Circuit Judges.

PER CURIAM:

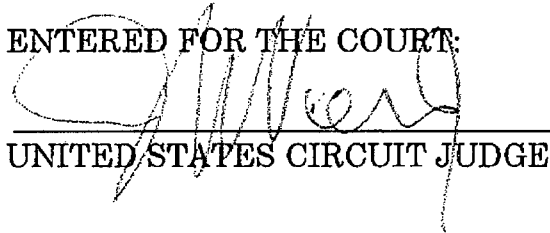
- (✓) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
- () The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for

Appellate F

Rehearing En Banc is also DENIED.

- () A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

FILED

FEB 24 2016

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY JB DEPUTY

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

GARY DEWAYNE OATMAN,
TDCJ No. 01599836
Petitioner,

VS.

RICK THALER,
Director, Texas Department of Criminal
Justice, Correctional Institutions
Division,
Respondent.

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C.A. No. 6:13-CV-105

**REPORT AND RECOMMENDATION OF
THE UNITED STATES MAGISTRATE JUDGE**

**TO: THE HONORABLE WALTER S. SMITH, JR.,
UNITED STATES DISTRICT JUDGE**

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(c) and Rules 1(h) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

I. BACKGROUND AND STATEMENT OF THE CASE

Petitioner Gary Dewayne Oatman filed the instant action pursuant to 28 U.S.C. § 2254. Petitioner is before the Court pro se. He is in custody of the Texas Department of Criminal Justice—Correctional Institutions Division pursuant to a judgment from the 426th District Court of Bell County, Texas. A jury convicted Petitioner for aggravated assault with a deadly weapon. The court assessed punishment, enhanced by previous felony convictions, at seventy years of imprisonment. ECF No. 1 at 2. On June 9, 2011 the Third District Court of Appeals affirmed the conviction. *Oatman v. State*, 2011 Tex. App. LEXIS 4426 (Tex. App.—Austin June 9, 2011).

The Court of Criminal Appeals refused his petition for discretionary review on October 12, 2011. *In re Oatman*, 2011 Tex. Crim. App. LEXIS 1369 (Tex. Crim. App. Oct. 11, 2011).

On December 23, 2012, Petitioner filed his first application for a state writ of habeas corpus. ECF No. 1 at 4. The Court of Criminal Appeals denied Petitioner's first application on February 27, 2013. ECF No. 1 at 4. Petitioner filed his federal petition for a writ of habeas corpus on March 21, 2013. ECF No. 1 at 13.

In the instant case, Petitioner raises fifteen claims:

- 1) Insufficient evidence to support his conviction;
- 2) Denial of due process by sentencing the Petitioner with an illegal sentence;
- 3) Denial of due process due to failure of the state to file sufficient notice of its intent to enhance the Petitioner's sentence;
- 4) Denial of due process by using enhancement paragraphs that were not contained within the indictment;
- 5) Ineffective assistance of counsel due to failure to call an alibi witness;
- 6) Ineffective assistance of counsel due to failure to poll the jury before requesting a mistrial;
- 7) Ineffective assistance of counsel due to failure to investigate for other witnesses;
- 8) Ineffective assistance of counsel due to failure to obtain exculpatory testimony from available witnesses;
- 9) Ineffective assistance of counsel due to failure to request an "Allen" charge instruction during jury deliberations;
- 10) Ineffective assistance of counsel due to failure to research Texas sentence enhancement law;
- 11) Denial of due process due to failure of the trial judge to give an "Allen" charge during jury deliberations;
- 12) Denial of due process due to failure of appellate counsel to research Texas sentence enhancement law;

Petitioner filed his section 2254 petition for writ of habeas corpus on March 21, 2013, therefore his petition is subject to section 2254.

B. The Petition Is Untimely Under the AEDPA.

The AEDPA provides a one-year limitation period for a state prisoner proceeding in federal court with a habeas corpus action. 28 U.S.C. § 2244(d)(1). The limitation period typically begins running on the date the judgment becomes final by the conclusion of direct review or the expiration of time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). The expiration of time for seeking such review is 90 days after entry of the order denying discretionary review. Sup. Ct. R. 13.1.

Here, a jury convicted Petitioner on September 9, 2009. ECF No. 1 at 2. The Third District Court of Appeals affirmed the Petitioner's conviction on June 9, 2011. ECF No. 1 at 3. The Court of Criminal Appeals refused the Petitioner's petition for discretionary review on October 12, 2011. ECF No. 1 at 3. Petitioner did not seek certiorari from the U.S. Supreme Court, and the time for seeking such review expired 90 days later, on January 10, 2012. In the absence of any tolling, the limitations period expired one year later on January 10, 2013.

1. Petitioner's Limitations Period Was Tolloed During the Pendency Of His State Application For Habeas Relief.

The time during which a properly filed application for state post-conviction review is pending will not be counted towards the limitation period. 28 U.S.C. § 2244(d)(2). A state petition for habeas relief is "pending" for AEDPA tolling purposes on the day it is filed through and including the day it is resolved. *Windland v. Quarterman*, 578 F.3d 314, 317 (5th Cir. 2009). A pro se inmate's petition for state post-conviction relief is deemed filed at the time it is delivered to prison authorities. *Richards v. Thaler*, 710 F.3d 573, 578-79 (5th Cir. 2013).

Here, the first state petition was filed on December 23, 2012. The Court of Criminal Appeals denied Petitioner's state petition on February 27, 2013. Therefore, the limitation period was tolled for 67 days while Petitioner's application for a state writ of habeas corpus was pending.

2. Petitioner Has Not Alleged Other Facts To Further Toll the Limitations Period.

Petitioner does not allege, nor do his pleadings suggest, the existence of any impediment to the filing of a state habeas action. 28 U.S.C. § 2244(d)(1)(B). Nor does Petitioner identify any new constitutional rule made retroactively applicable to habeas cases that would entitle him to tolling under section 2244(d)(1)(C). Petitioner's claims are of the kind that, through the exercise of due diligence, would have been discovered before his conviction became final. Therefore Petitioner is not entitled to further tolling under section 2244(d)(1)(D).

3. Petitioner's Application For Federal Habeas Relief Is Untimely.

Petitioner received 67 days of tolling for his properly filed state applications for post-conviction relief, in addition to 365 days provided by the limitation period, which amounts to 432 days. Petitioner's federal petition was due 432 days after his judgment became final on January, 10, 2012. Therefore his petition was due March 18, 2013. Petitioner did not sign his petition until March 21, 2013, thus it could not have been delivered to prison authorities by March 18, 2013. The petition is three days late and is untimely under section 2244.

III. RECOMMENDATION

For the foregoing reasons, the undersigned **RECOMMENDS** that the instant petition (ECF No. 1) be **DISMISSED**.

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which