

THE LOWER COURT OPINION(S) PER RULE 14.1(i)

NOTICE FROM U.S. DISTRICT COURT - WESTERN DISTRICT OF LOUISIANA

Donald M Boswell (PrisID: 567056)
David Wade Correctional Center
670 Bell Hill Rd
Homer, LA 71040

Case: 5:18-cv-00873 #6
10 pages printed: Tue Jul 24 10:01:24 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

**DONALD M. BOSWELL (#567056),
Petitioner**

CASE NO. 5:18-CV-0873; SEC. P

VERSUS

CHIEF JUDGE HICKS

**STATE OF LOUISIANA,
Respondent**

MAGISTRATE JUDGE PEREZ-MONTES

REPORT AND RECOMMENDATION

Before the Court is a petition for writ of habeas corpus (28 U.S.C. § 2254) filed by pro se Petitioner Donald M. Boswell (#567056) (“Boswell”). Boswell is an inmate in the custody of the Louisiana Department of Corrections, incarcerated at the David Wade Correctional Center in Homer, Louisiana. Boswell challenges his conviction and sentenced imposed in the 26th Judicial District Court, Webster Parish.

Because Boswell’s § 2254 petition is untimely, it should be denied and dismissed.

I. Background

Boswell was indicted by the Webster Parish Grand Jury on one count of aggravated rape of a juvenile, and one count of indecent behavior with a juvenile. State v. Boswell, 46,181 (La. App. 2 Cir. 4/13/11), 62 So.3d 874, 875, writ denied, 2011-1246 (La. 12/2/11), 76 So.3d 1174. Boswell entered a plea of guilty to one count of attempted aggravated rape. Id. at 876. At sentencing, the court noted that the victim had been entrusted to Boswell by her mother, who was one of Boswell’s employees. Id. “While Boswell was allegedly caring for the victim, he had her

sleeping in his bed in the nude and had both vaginal and oral intercourse with her.”

According to the appellate court, Boswell argued that the 11-year-old victim was the aggressor or initiator. Id. The trial judge listed numerous aggravating factors in sentencing Boswell to 48 years at hard labor. Id.

On appeal, Boswell conceded that “punishment is necessary and required for his criminal activity and [he] does accept punishment.” Id. at 877. However, Boswell maintained that his sentence was excessive. Id. The appellate court concluded otherwise, and affirmed the sentence. Id. The application for rehearing was denied. Id. The Louisiana Supreme Court denied writs. State v. Boswell, 2011-1246 (La. 12/2/11), 76 So.3d 1174.

Boswell filed his first application for post-conviction relief on May 14, 2012. (Doc. 1, p. 3). Boswell raised claims of ineffective assistance of counsel, excessive sentence, and illegal sentence. (Doc. 1, p. 3). The application was denied, and Boswell sought a supervisory writ of review in the appellate court. Boswell’s writ application was denied on September 11, 2014. (Doc. 1-2, p. 1).

Boswell subsequently filed three motions asking the appellate court to order Boswell’s attorney to provide Boswell with copies of documents, to check out the appellate court’s record, and for an extension of time within which to seek review in the Louisiana Supreme Court. (Doc. 1-2, p. 2). The appellate court denied relief on December 17, 2014, and reminded Boswell that that the Louisiana Supreme Court’s time limits were governed by Rule X of the Rules of the Louisiana Supreme Court. (Doc. 1-2, p. 2). Boswell sought review in the Louisiana Supreme Court, but his

application was not considered because it was untimely filed under Rule X. (Doc. 1-2, p. 5). Boswell's request for reconsideration was denied on February 5, 2016. State ex rel. Boswell v. State, 2015-0030 (La. 2/5/16), 186 So.3d 1159.

Boswell filed a motion to withdraw his guilty plea in the trial court on July 21, 2014. (Doc. 1, p. 4). The motion was denied, and Boswell sought supervisory review in the appellate court. (Doc. 1-2, p. 3). The appellate court denied writs on December 18, 2014. (Doc. 1-2, p. 3). Again, Boswell's writ application to the Louisiana Supreme Court was not considered because it was untimely filed. (Doc. 1-2, p. 9). State ex rel. Boswell v. State, 2016-0855 (La. 5/19/17), 219 So.3d 1077, reconsideration denied, 2016-0855 (La. 9/15/17), 225 So.3d 1088.

Boswell filed another application for post-conviction relief on September 27, 2017, which was denied as repetitive. (Doc. 1-2, p. 19). Writs were denied by the Louisiana Second Circuit Court of Appeal on January 25, 2018. (Doc. 1-2, p. 21). According to Boswell, his writ application is pending in the Louisiana Supreme Court. (Doc. 1, p. 14).

II. Law and Analysis

A. Boswell's § 2254 petition is untimely.

In 1996, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress enacted 28 U.S.C. § 2244(d), which provides a one-year statute of limitations for filing applications for writs of habeas corpus by persons in custody pursuant to the judgment of a state court. This limitations period generally runs from "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). Federal courts may raise the one-year limitations period *sua sponte*. See Kiser v. Johnson, 163 F.3d 326 (5th Cir. 1999).

Because he did not seek writs in the United States Supreme Court on direct review, Boswell’s conviction became final for AEDPA purposes 90 days after the Louisiana Supreme Court denied writs. Thus, the one-year limitations period began to run on March 1, 2012.

The statutory tolling provision of § 2244(d)(2) provides that the time during which a properly filed application for post-conviction relief is pending in state court is not counted toward the limitations period. Ott v. Johnson, 192 F.3d 510, 512 (5th Cir. 1999); Fields v. Johnson, 159 F.3d 914, 916 (5th Cir. 1998).

Boswell’s application remained pending until the Second Circuit Court of Appeal denied writs on September 11, 2014. (Doc. 1-2, p. 1). Thereafter, Boswell filed an untimely writ in the Louisiana Supreme Court, which was not considered. (Doc. 1-2, p. 5). State ex rel. Boswell v. State, 2015-0030 (La. 2/5/16), 186 So.3d 1159.

However, Boswell filed a motion to withdraw his guilty plea on July 21, 2014, which can be considered an application for post-conviction relief. State v. Smith, 406 So.2d 1314, 1316 (La. 1981) (a trial court adjudicating a motion to withdraw guilty plea after sentencing acts pursuant to its post-conviction jurisdiction). Thus, the prescriptive period continued to toll while the motion to withdraw Boswell’s plea was properly pending.

The motion was denied on August 11, 2014, and the Second Circuit denied writs on December 18, 2014. (Doc. 1-2, p. 3). Boswell had 30 days—until January 7, 2015, within which to seek writs in the Louisiana Supreme Court. Louisiana Supreme Court Rule X. Boswell did not file the writ application until the following year, and the writ was not considered because it was not timely filed. (Doc. 1-2, p. 10). The Louisiana Supreme Court advised Boswell that he had exhausted his right to obtain post-conviction relief in state court. State ex rel. Boswell v. State, 2016-0855 (La. 5/19/17, 1), 219 So.3d 1077, reconsideration denied, 2016-0855 (La. 9/15/17), 225 So.3d 1088.

Because Boswell did not file a timely writ application in the Louisiana Supreme Court, his motion to withdraw the guilty plea was no longer properly pending after January 7, 2015, and could no longer toll the statute of limitations. See Williams v. Cain, 217 F.3d 303 (5th Cir. 2000) (application for post-conviction relief ceased to be “properly filed” for purposes of tolling the limitations period when petitioner failed to file his application within 30-day period allowed by state court rule); Bedford v. Miller, 2007 WL 1870073 (E.D. La. 2007) (citations omitted) (untimely filing of appeal is not properly filed, leaving the application no longer pending); Zeno v. Cain, 2009 WL 4329907 (W.D. La. 2009) (untimely writ application in Louisiana Supreme Court was not a properly filed post-conviction pleading that could toll the AEDPA limitations period).

Therefore, Boswell is entitled to tolling until January 7, 2015, and Boswell had one year within which to file a habeas petition. Boswell did not file his § 2254 petition

in this Court until March 26, 2018, over two year after the prescriptive period expired. Bowell's subsequent and duplicative post-conviction application was not filed until September 27, 2017, also after the one-year AEDPA period had expired. (Doc. 1-2, p. 19). Thus, Boswell receives no tolling benefit from the filing of that application.

The United States Supreme Court has held that the AEDPA's statute of limitations is subject to equitable tolling. See Holland v. Florida, 560 U.S. 631, 645 (2010). However, "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Id. at 649 (internal quotation marks omitted); accord Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998) (holding that the AEDPA's statute of limitations can be equitably tolled "in rare and exceptional circumstances"). A petitioner bears the burden of proof to invoke equitable tolling. See Alexander v. Cockrell, 294 F.3d 626, 629 (5th Cir. 2002). Boswell submits no evidence demonstrating that he is entitled to equitable tolling; and this Court knows of no such evidence.

Although Boswell claims his attorney's negligence caused his first writ application in the Louisiana Supreme Court to be untimely filed, attorney negligence does not provide a basis for equitable tolling. See Montgomery v. Hale, 648 F. App'x 444, 445 (5th Cir. 2016) (citing Holland v. Florida, 560 U.S. 631 (2010); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)).

III. Conclusion

Because Boswell's § 2254 petition is untimely, IT IS RECOMMENDED that the petition be DENIED and DISMISSED, with prejudice.

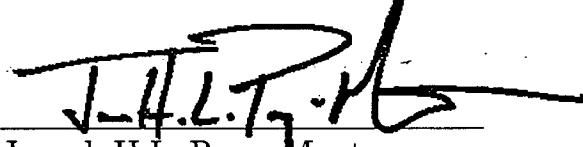
Under the provisions of 28 U.S.C. § 636(b)(1)(c) and Fed.R.Civ.P. 72(b), parties aggrieved by this Report and Recommendation have fourteen (14) calendar days from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. No other briefs (such as supplemental objections, reply briefs, etc.) may be filed. Providing a courtesy copy of the objection to the undersigned is neither required nor encouraged. Timely objections will be considered by the District Judge before a final ruling.

Failure to file written objections to the proposed findings, conclusions, and recommendations contained in this Report and Recommendation within fourteen (14) days from the date of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Judge, except upon grounds of plain error.

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Unless a circuit justice or district judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. Within 14 days from service of this Report and Recommendation, the parties may file a memorandum setting forth arguments on

whether a certificate of appealability should issue. See 28 U.S.C. § 2253(c)(2). A courtesy copy of the memorandum shall be provided to the District Judge at the time of filing.

THUS DONE AND SIGNED in chambers in Alexandria, Louisiana, this
24th day of July, 2018.



Joseph H.L. Perez-Montes
United States Magistrate Judge

U.S. District Court

Western District of Louisiana

Notice of Electronic Filing

The following transaction was entered on 7/24/2018 at 9:54 AM CDT and filed on 7/24/2018

Case Name: Boswell v. Louisiana

Case Number: 5:18-cv-00873-SMH-JPM

Filer:

Document Number: 6

Docket Text:

REPORT AND RECOMMENDATIONS re [1] Petition for Writ of Habeas Corpus filed by Donald M Boswell. IT IS RECOMMENDED that the petition be DENIED AND DISMISSED WITH PREJUDICE. Objections to R&R due by 8/7/2018. Signed by Magistrate Judge Joseph H L Perez-Montes on 7/24/2018. (crt,Tice, Y)(a)

NOTICE FROM U.S. DISTRICT COURT - WESTERN DISTRICT OF LOUISIANA

Donald M Boswell (PrisID: 567056)
David Wade Correctional Center
670 Bell Hill Rd
Homer, LA 71040

Case: 5:18-cv-00873 #8
3 pages printed: Wed Aug 1 9:21:13 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DONALD M. BOSWELL

CIVIL ACTION NO. 18-0873

VERSUS

JUDGE S. MAURICE HICKS, JR.

STATE OF LOUISIANA

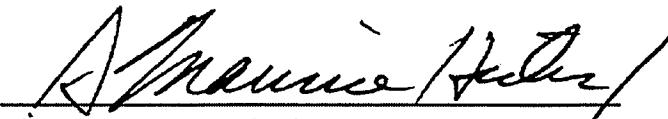
MAGISTRATE JUDGE PEREZ-MONTES

ORDER

Considering the Motion for Extension of Time to File Objections to the Report and Recommendation of the Magistrate Judge (Record Document 7) filed by Petitioner Donald M. Boswell ("Boswell"),

IT IS ORDERED that the Motion for Extension of Time to File Objections to the Report and Recommendation of the Magistrate Judge (Record Document 7) be and is hereby **GRANTED**. Boswell's objections to the Report and Recommendation are due **August 22, 2018**.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 31st day of July, 2018.


S. MAURICE HICKS, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

U.S. District Court
Western District of Louisiana

Notice of Electronic Filing

The following transaction was entered on 8/1/2018 at 9:08 AM CDT and filed on 7/31/2018

Case Name: Boswell v. Louisiana

Case Number: 5:18-cv-00873-SMH-JPM

Filer:

Document Number: 8

Docket Text:

ORDER granting [7] Motion for Extension of Time to File Response/Reply re [6] REPORT AND RECOMMENDATIONS re [1] Petition for Writ of Habeas Corpus filed by Donald M Boswell. Objections to R&R due by 8/22/2018. Signed by Chief Judge S Maurice Hicks, Jr on 7/31/2018. (crt,Haik, K)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DONALD M. BOSWELL,
Petitioner

CASE NO. 5:18-CV-0873; SEC.P

VERSUS

CHIEF JUDGE HICKS

STATE OF LOUISIANA,
Respondent

MAGISTRATE JUDGE PEREZ-MONTES

PETITIONER'S OBJECTIONS TO REPORT AND RECOMMENDATION

NOW INTO THIS HONORABLE COURT, comes the Petitioner, who respectfully submits the following:

INTRODUCTION

Before this Court is a petition for writ of habeas corpus (28 U.S.C. §2254) filed by pro se' Petitioner Donald M. Boswell (#567056) ("Boswell"). Boswell is an inmate in the custody of the Louisiana Department of Corrections, incarcerated at the David Wade Correctional Center in Homer, Louisiana. Boswell challenges his conviction and sentence imposed in the 26th Judicial District Court, Webster Parish.

This Court believes Boswell's §2254 petition is untimely, and it should be denied and dismissed.

MAY IT PLEASE THIS HONORABLE COURT:

Boswell avers that he has been pursuing his rights diligently, and that some extraordinary circumstances stood in his way and prevented timely filing by no fault of his own, but rather it is fault of the State. He will now try to fully explain those extra-

ordinary circumstances.

The trial judge was mislead of the facts, in his case, by the state, and, therefore, the aggravating factors he listed in sentencing Boswell were incorrectly applied making his case to appear wosre than it really is.

Because Boswell was a former reserve sheriff's deputy, on the night of his arrest on October 6, 2009 until April 2011, he has been on lockdown and was not allowed access to the prison law library until he was finally placed in a protection custody dorm, therefore, he was prevented by the system form filing anything on his own behalf any earlier then he has.

On appeal from his sentence, State v Boswell, 46,181 (La. App. 2nd Cir. 4/13/11), 62 So.3d 874, 875, was filed by, then hired attorney, Marti Grosjean=Pearson without ever confiring with Boswell concerning the facts, discrepancies or misleading statements in his case before filing his appeal to the appellate court.

Mrs. Pearson, on her own, stated Boswell conceded that "punishment is necessary and required for his criminal activity and [he] does accept ounishment." Id at 877. HOWEVER, Boswell never said this statement. These are not his words, but rather the words of Attorney Pearson among other flase things she said and added.

The district court would not let Mrs. Pearson have access to Boswell's case file. Therefore, Mrs. Pearson filed his appeal based on hearsay and included many other false statements, misleading and incorrect information that Boswell did not say or do in his case. Attorney Pearson never provided a copy of said brief to Boswell to sign or review and make the necessary corrections before filing.

Boswell's brief was denied as "improper format by attorney" filed on his behalf.

Mrs. Pearson was subsequently permanently disbarred for life as a result in 2012 after Boswell filed a complaint against her for unprofessional conduct with the State Disciplinary Board as he indicated in his habeas corpus application

Boswell, unskilled in the art of law, asked the prison inmate counsel to file an appeal to the Louisiana Supreme Court on the above 2nd Cir. denial. Brief was filed and denied as "incompletely filed" on December 2, 2011.

Before his (2)yrs were up after completion of his direct appeal Boswell filed his First application for post-conviction relief on May 8, 2012. The state listed the dates as May 14, 2012. Thus said, the district court sat on his PCR for over a year before moving forward even after Boswell had made several inquires of its progress.

Once Boswell's PCR was considered an evidentiary hearing was granted and a contradictoy attorney, Tristian P. Gilley, was assigned to represent him on said hearing.

ADA John Montgomery stated in (5) different hearings that the state had lost Boswell's case and then refused to answer the trial judge as to "then why are you still holding Boswell in prison if you have no file on him?" The prosecution gave no reason and called for a sidebar. Boswell's PCR application was denied directly after.

Attorney Gilley filed an appeal of Boswell's PCR to the 2nd Cir. without ever informaing Boswell of the content of his brief before filing nor did he ever provide him with a copy of said brief.

Appeal was denied without reason and Attorney Gilley then abandoned Boswell. Therefore, Boswell subsequently filed (3) different motions asking the appellate court to order Mr. Gilley to provide him with a copy of his appeal brief, to check out the appellate court's record, and an extention of time to file to the Supreme Court, (docket no. 49,604 - KW) was assigned. Appellate court granted and Ordered Attorney Gilley to provide Boswell with his requested court documents but denied the remaining motions as not permitted.

Boswell then filed appeal brief to the 2nd Cir. for the denial of his PCR Application to review on October 21, 2014 (docket no. 49,798 - KH), writ denied December 18, 2014 without reason.

Immediately thereafter receiving denial letter Boswell then prepared a Supervisory Writ to the Louisiana Supreme Court timely filed said writ (11) days later, on December 29, 2014.

LSC received writ January 6, 2015 nad assigned (docket no. 2015 - KH - 0033). However, a huge discrepancy occured and somehow a court clerk looked up the wrong docket number in Boswell's case. (Docket no. 49,798 - KH) should have reviewed, but inadvertently (docket no. 49,604 - KW) of the 2nd Cir. was reviewed instead, and as a result the LSC denied and dismissed his case as "UNTIMELY".

Through correspondence the discrepancy was eventually corrected and his writ was reinstated as "pending review by the LSC" but no further movement was made.

Boswell also on December 29, 2014 filed an "application for Writ of Mandamus" to the Appellate Court (docket no. KH 15-49992)

asking the court to order the district court to move in other legal matters. However, when Boswell filed an appeal from the denial of the appellate court to the LSC docket numbers were AGAIN inadvertently mixed up with (docket 2015 - KH - 0033) along with 2nd Cir. (docket no. 49,604 - KW) further complicating matters and files mixed up even worse.

Boswell wrote letters requesting a progress report to the LSC on the above docket number. On April 19, 2016, he placed a legal call to the clerk of the LSC inquiring the progress of his writ. Clerk, after searching, advised him his writ had been lost and gave him permission to refile original writ and was granted a new (docket no. 2016 - KH - 0855).

Boswell, for the next 12 months, continued to monitor the progress of his writ either by phone, court website, or by written correspondence with the Court's response always being "writ still pending review".

Boswell, on May 19, 2017, received a denial of his Supervisory Writ stating "WRIT NOT CONSIDERED as UNTIMELY FILED" due to the January 5, 2015 discrepancy from the fault of appellate court and LSC. Even though Boswell had timely filed his brief (11) days after his denial from appellate court and no fault on his part he was still denied as UNTIMELY.

Boswell's family member called the LSC Cheif Clerk, Mr. Olivier, concerning the above denial. Clerk gave permission for Boswell to resubmit a new brief for the court to review.

Boswell in June 2017 refiled his original criminal brief on

(docket no. 1026 - KH - 0855) and also filed an Application for Supervisory Writ on a civil matter from the denial of 2nd Cir. (docket no. CW-- 17-51615) to the LSC for both to be reviewed.

LSC denied both writs stating AGAIN due to his untimely filing of writ his writs were NOT CONSIDERED and, therefore, Boswell had exhausted his state remedies for relief, EVEN THOUGH he had just been given permission by the court clerk to refile the brief they had mixed up; docket numbers on.

This Honorable Court mentioned a denial of a reconsideration from the 2nd Cir. before Boswell went to the LSC. That denial was from the civil matter mentioned above and has nothing to do with his habeas corpus application time line and this Court should not consider that particular brief at this time.

However, in his research, Boswell found some new information, in his case, an on September 25, 2017, filed a 2nd PCR under "Newly Discovered Evidence" - Having NO PLEA AGREEMENT and ineffective assistance of counsel." Trial court dismissed his application as "previously raised similar claims" on November 6, 2017.

Boswell filed writ, for review, to the 2nd Cir. (docket no. 52,110 - KH) which was denied on January 25, 2018 as "On the showing made, this writ is denied, La.C.Cr.P. art. 930.8"

Boswell, then filed Supervisory Writ to the LSC on February 5, 2018, from the 2nd Cir. Writ was received by clerk and assigned (docket no. 2018 - KH -0350), however, Boswell did not receive a confirmation letter from clerk. His family member called the Chief

Clerk and was advised court had not received said writ application and was told to refile his writ which was done by certified mail on March 1, 2018. "Writ still pending review" currently as Boswell has indicated in his habeas corpus application.

Boswell then prepared and on March 16, 2018, signed his Habeas Corpus Application which he sent by certified mail and was received by the clerk on March 26, 2018. HOWEVER, just like most all of Boswell's briefs filed in the state courts his habeas corpus app. was received but filed in the wrong place where it remained lost or misfiled for 100 plus days until his family member called this Court's Clerk and when his file was discovered, she assigned (case no.: 5:18 - CV - 00873 SEC. P) and a Memorandum Order was granted on July 5, 2018. File was then back dated to reflect correct date his application was actually received on March 26, 2018, so as to not delay the timing of his habeas corpus application.

LAW AND ANALYSIS

The statutory tolling provision of §2244(d)(2) provides that the time during which a properly filed application for post-conviction relief is pending in state court is not counted toward the limitation period. Ott v. Johnson, 192 F.3d 510, 512 (5th Cir. 1999); Fields v Johnson, 159 F.3d 914, 916 (5th Cir. 1998).

Boswell's current 2nd post-conviction application filed under "Newly Discovered Evidence" is still pending review in the LSC (docket no. 2018 - KH - 0350) which allows for statutory tolling.

Petitioner, Boswell, has shown true diligence in that he has continually filed appeal briefs in a timely manner, however, he has also shown that it is the states fault that his briefs are not TIMELY due to the facts shown that the state has lost or mixed up his docket numbers between the appellate court and the Louisiana Supreme Court on more than one occasion. He has tried very hard and to no avail to clear up the state's mistakes in properly filing his appeal briefs.

The record suggests that the state-created impediments that prevented the filing of Boswell's petition for writ of habeas corpus in a timely manner, see 28 U.S.C. §2244(d)(1)(B), due to the aforementioned lost or mixed up docket numbers by the state.

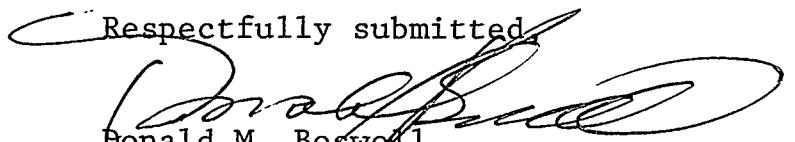
CONCLUSION

The United States Supreme Court has held that the AEDPA's statute of limitations is subject to equitable tolling. See, Holland v Florida, 560 U.S. 631, 645 (2010). A petitioner bears the burden of proof to invoke equitable tolling. See, Alexander v. Cockrell, 294 F.3d 626, 696 (5th Cir. 2002). Therefore, Petitioner, Boswell is entitled to equitable tolling because he has shown (1) that he has been pursuing his rights diligently, and (2) that because of the fault of the state some extraordinary circumstances stood in his way and prevented timely filing. Wherefore, the AEDPA's statute of limitations can be equitable tolling "in rare and exceptional circumstances" can be properly applied to Boswell's application for writ of habeas corpus in his particular case.

These are Boswell's written objections to the proposed findings, conclusions, and recommendations contained within this Honorable Court's Report and Recommendation where he respectfully asks this Court to reconsider their Ruling done and signed in chambers this past 24th day of July, 2018, and without prejudice.

THIS SIGNED AND DATED the 30th day of July, 2018.

Respectfully submitted


Donald M. Boswell
DOC# 567056

NOTICE FROM U.S. DISTRICT COURT - WESTERN DISTRICT OF LOUISIANA

Donald M Boswell (PrisID: 567056)
David Wade Correctional Center
670 Bell Hill Rd
Homer, LA 71040

Case: 5:18-cv-00873 #10
3 pages printed: Fri Aug 3 13:41:07 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DONALD M. BOSWELL

CIVIL ACTION NO. 5:18-CV-000873

VERSUS

JUDGE S. MAURICE HICKS, JR.

STATE OF LOUISIANA

MAGISTRATE JUDGE PEREZ-MONTES

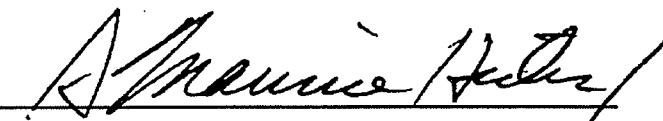
JUDGMENT

For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, and after independent (de novo) review of the record including the objections filed herein, and having determined that the findings and recommendation are correct under the applicable law;

IT IS ORDERED that Boswell's § 2254 petition for writ of habeas corpus is **DENIED**
AND DISMISSED WITH PREJUDICE.

Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. The court, after considering the record in this case and the standard set forth in 28 U.S.C. Section 2253, denies a certificate of appealability because the applicant has not made a substantial showing of the denial of a constitutional right.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana on this 3rd day of August, 2018.


S. MAURICE HICKS, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

U.S. District Court

Western District of Louisiana

Notice of Electronic Filing

The following transaction was entered on 8/3/2018 at 1:30 PM CDT and filed on 8/3/2018

Case Name: Boswell v. Louisiana

Case Number: 5:18-cv-00873-SMH-JPM

Filer:

WARNING: CASE CLOSED on 08/03/2018

Document Number: 10

Docket Text:

JUDGMENT adopting [6] Report and Recommendations re [1] Petition for Writ of Habeas Corpus. IT IS ORDERED that Boswell's § 2254 petition for writ of habeas corpus is DENIED AND DISMISSED WITH PREJUDICE. The court denies a certificate of appealability. Signed by Chief Judge S Maurice Hicks, Jr on 8/3/2018. (crt,Keifer, K)

NOTICE FROM U.S. DISTRICT COURT - WESTERN DISTRICT OF LOUISIANA

Donald M Boswell (PrisID: 567056)
David Wade Correctional Center
670 Bell Hill Rd
Homer, LA 71040

Case: 5:18-cv-00873 #11
4 pages printed: Fri Aug 10 7:21:07 2018

RECEIVED

AUG 09 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

TONY R. MOORE CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA
BY DP

DONALD M. BOSWELL

CIVIL ACTION NO. 5:18-CV-000873

VERSUS

JUDGE S. MAURICE HICKS, JR

JERRY GOODWIN, WARDEN

MAGISTRATE JUDGE PEREZ-MONTES

NOTICE OF INTENT TO APPEAL

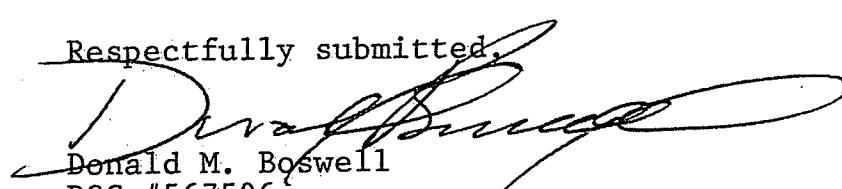
MAY IT PLEASE THIS COURT:

NOW COMES: Donald M. Boswell, Petitioner pro se', who gives Notice of his Intent to Appeal to the United States Court of Appeal for the Fifth Circuit from the final ORDER & AMENDED JUDGMENT rendered on August 3, 2018, dismissing with prejudice Petitioner's habeas corpus under 28 U.S.C. § 2253 under the above captioned matter.

This Notice is filed pursuant to Fed.R.App.P. 4(a), which requires Notice of Intent to Appeal to be filed with the Court within thirty (30) days from the date of entry of judgment to be appealed.

THIS DONE AND SIGNED ON THE 7th DAY OF August, 2018
IN HOMER, LOUISIANA.

Respectfully submitted,


Donald M. Boswell
DOC #567506
David Wade Correctional Center
Homer, Louisiana 71040-2150

J. Boswell
567056
Ducc/NSD
670 Bell Hill Rd
Homey, LA 71040

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U.S. District Court
Western District of Louisiana
Court House
300 Fannin St., Suite 1167
Shreveport, LA 71101-3083

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WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

AUG 09 2018

U.S. District Court

Western District of Louisiana

Notice of Electronic Filing

The following transaction was entered on 8/10/2018 at 7:18 AM CDT and filed on 8/9/2018

Case Name: Boswell v. Louisiana

Case Number: 5:18-cv-00873-SMH-JPM

Filer: Donald M Boswell

WARNING: CASE CLOSED on 08/03/2018

Document Number: 11

Docket Text:

NOTICE OF APPEAL as to [10] Judgment re Report and Recommendations,, Order on Report and Recommendations, by Donald M Boswell. FEE STATUS: IFP GRANTED (Attachments: # (1) Envelope)(crt,WalkerSld, B)

NOTICE FROM U.S. DISTRICT COURT - WESTERN DISTRICT OF LOUISIANA

Donald M Boswell (PrisID: 567056)
David Wade Correctional Center
670 Bell Hill Rd.
Homer, LA 71040

Case: 5:18-cv-00873 #10
3 pages printed: Fri Aug 10 7:21:01 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DONALD M. BOSWELL

CIVIL ACTION NO. 5:18-CV-000873

VERSUS

JUDGE S. MAURICE HICKS, JR.

STATE OF LOUISIANA

MAGISTRATE JUDGE PEREZ-MONTES

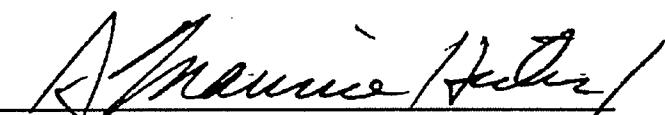
JUDGMENT

For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, and after independent (de novo) review of the record including the objections filed herein, and having determined that the findings and recommendation are correct under the applicable law;

IT IS ORDERED that Boswell's § 2254 petition for writ of habeas corpus is **DENIED**
AND DISMISSED WITH PREJUDICE.

Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. The court, after considering the record in this case and the standard set forth in 28 U.S.C. Section 2253, denies a certificate of appealability because the applicant has not made a substantial showing of the denial of a constitutional right.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana on this 3rd day of August, 2018.



S. MAURICE HICKS, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

U.S. District Court

Western District of Louisiana

Notice of Electronic Filing

The following transaction was entered on 8/10/2018 at 7:16 AM CDT and filed on 8/3/2018

Case Name: Boswell v. Louisiana

Case Number: 5:18-cv-00873-SMH-JPM

Filer:

WARNING: CASE CLOSED on 08/03/2018

Document Number: No document attached

Docket Text:

CERTIFICATE OF APPEALABILITY DENIED. Signed by Chief Judge S Maurice Hicks, Jr on 8/3/2018. (crt,WalkerSld, B)

18-30931

Mr. Donald M. Boswell
#567056
David Wade Correctional Center
670 Bell Hill Road
Homer, LA 71040-0000

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 15, 2018

#567056

Mr. Donald M. Boswell
David Wade Correctional Center
670 Bell Hill Road
Homer, LA 71040-0000

No. 18-30931 Donald Boswell v. State of Louisiana, et al
USDC No. 5:18-CV-873

Dear Mr. Boswell,

We have docketed the appeal as shown above, and ask you to use the case number above in future inquiries.

Before this appeal can proceed you must apply for a certificate of appealability (COA) to comply with 28 U.S.C. § 2253. If you wish to proceed, address your motion for COA to this court. Also send a separate brief supporting the motion. In the brief set forth the issues, clearly give supporting arguments. Your "motion for COA" and "brief in support" together may not exceed a total of 30 pages. You must file 2 legible copies within 40 days from the date of this letter. If you do not do so we will dismiss the appeal, see 5th CIR. R. 42. Note that 5th CIR. R. 31.4 and the Internal Operating Procedures following rules 27 and 31 provides the general sense of the court on the disposition of a variety of matters, which includes that except in the most extraordinary circumstances, the maximum extension for filing briefs is 30 days in criminal cases and 40 days in civil cases.

Reminder as to Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By:

Lisa E. Ferrara, Deputy Clerk

504-310-7675

CC:

Mr. Tony R. Moore

Case No. 18-30931

DONALD M. BOSWELL,

Petitioner - Appellant

v.

STATE OF LOUISIANA; JERRY GOODWIN, WARDEN, DAVID WADE
CORRECTIONAL CENTER,

Respondents - Appellees

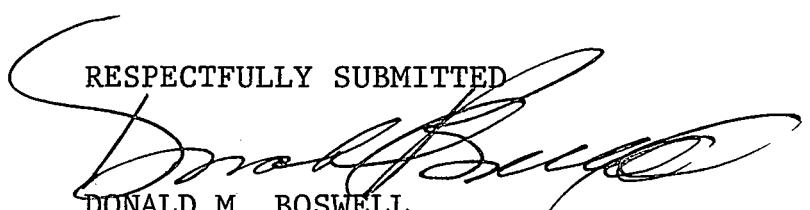
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO.: 18-30931

DONALD M. BOSWELL
VERSUS
STATE OF LOUISIANA

BRIEF IN SUPPORT
OF APPLICATION FOR A CERTIFICATE OF APPEALABILITY
FROM THE DENIAL OF THE DISTRICT COURT ON
JULY 24, 2018

RESPECTFULLY SUBMITTED


DONALD M. BOSWELL
DOC #567056
DAVID WADE CORRECTIONAL CENTER
670 BELL HILL ROAD - N5D
HOMER, LA 71040-2150

PETITIONER

TABLE OF AUTHORITIES

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

28 U.S.C. §2254	1
28 U.S.C. §2244(d)(1);(2)	2, 10, 11
28 U.S.C. §2253(c)(2)	2

UNITED STATES SUPREME COURT

Slack v McDaniel, 529 U.S. 473, 481, 484 (2000)	1, 2
Holland v Johnson, 560 U.S. 631, 645 (2010)	3, 11
Carey v Saffold, 536 U.S. 214, 220, S.Ct. 2134, 153 L. ED. 2d 260 (2002)	10

FEDERAL APPEALS COURTS

Davis v Johnson, 158 F.3d 806, 811 (5th Cir. 1998)	3
Ott v Johnson, 192 F.3d 510, 512 (5th Cir. 1999)	10
Fields v Johnson, 159 F.3d 914, 916 (5th Cir. 1998)	10
Alexander v Cockrell, 294 F.3d 626, 696 (5th Cir. 2002)	11

LOUISIANA APPELLATE COURT

State v Boswell, 46,181 (La. App. 2nd Cir. 4/13/11), 62 So.3d 874-877	4
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO.: 18-30931

DONALD M. BOSWELL CIVIL ACTION
VERSUS U.S.D.C. NO.: 5:18-CV-873
SECTION P
STATE OF LOUISIANA JUDGE: S. MAURICE HICKS, JR.

BRIEF IN SUPPORT
OF APPLICATION FOR A CERTIFICATE OF APPEALABILITY

COMES NOW Petitioner, Donald M. Boswell, and prays this Honorable Court issue a Certificate of Appealability. In support of application, Boswell states his brief as follows.

The District Court, on July 24, 2018, DENIED AND DISMISSED WITH PREJUDICE Mr. Boswell's Petition for Writ of Habeas Corpus as "UNTIMELY", even though Boswell currently has his postconviction relief application "still pending" in the Louisiana Supreme Court, Docket No.: 2018-KH-0350.

SCOPE OF REVIEW FOR COA

Congress mandates that a prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, petitioner must first seek and obtain a COA. Slack v McDaniel, 529 U.S. 473, 481 (2000).

C C

Congress has also established in a provision of the Anti-terrorism and Effective Death Penalty Act (AEDPA) of 1996 (28 U.S.C. § 2244(d)(1)) sets a 1-year statute of limitations for petitioners seeking federal habeas corpus relief from a state-court judgment, and further provides, in §2244(d)(2), that limitations period for a state prisoner's filing a federal habeas corpus petition excludes the time during which an "application for state collateral review" "is pending" -a state postconviction application "remains pending" "until the application has achieved final resolution through the state's postconviction procedures"; that is, state remedies are exhausted at the end of state-court review.

An appellate court reviews a court's application of the equitable tolling doctrine for abuse of discretion, and reviews the court's findings of facts for clear error and its determination of law de novo.

A prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. Section 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, Slack, *supra*, at 484.

Applying these principles to Boswell's application, a COA should be issued for the following grounds:

To be entitled to equitable tolling of a limitations period for filing a claim, litigants must show that (1) the litigants have been pursuing their rights diligently, and (2) some extraordinary circumstance stood in the litigants' way and prevented timely filing. See Holland v Florida, 560 U.S. 631, 645 (2010); also see Davis v Johnson, 158 F.3d 806, 811 (5th Cir. 1998) (holding that the AEDPS's statute of limitations can be equitably tolled "in rare and exceptional circumstances").

MAY IT PLEASE THIS HONORABLE COURT:

Boswell avers that he has been pursuing his rights diligently, and he can show that some extraordinary circumstances stood in his way and have prevented timely filing by no fault of his own, but rather it is the fault of the State of Louisiana. He will now try to fully explain those extraordinary circumstances through a time line of his filings with the State.

The trial judge was mislead of the facts, in Boswell's case, by the state, and therefore, the aggravating factors the judge listed in sentencing Boswell were incorrectly applied making his offense appear even more heinous.

Because Boswell was a former reserve sheriff's deputy, from the night of his arrest on October 6, 2009 until April 2011, he has been on lockdown and was not allowed access to the prison law library until he was finally placed in a protection custody dorm, therefore, Boswell was prevented by the system from filing anything on his own behalf any earlier then he has.

On appeal from his sentence, State v Boswell, 46,181 (La. App. 2nd Cir. 4/13/11), 62 So.3d 874, 875, was filed by, then hired attorney, Marti Grosjean-Pearson and without her ever confiring with Mr. Boswell concerning the facts, discrepancies or misleading statements in his case she filed his appeal to the appellate court.

Mrs. Pearson, on her own, in his appeal, stated Boswell conceded that "punishment is necessary and was required for his criminal activity and [he] does accept punishment." Id at 877.

HOWEVER, Boswell never said this statement. These are not his words, but rather the adlibbed words of Attorney Pearson among many other false facts she said and added to his appeal.

The district attorney would not let Mrs. Pearson have access to Boswell's case file. Therefore, Mrs. Pearson filed his appeal based on hearsay from the D.A.'s Office which included many false of misleading statements and other incorrect information that Mr. Boswell did not say or do in his case. Attorney Pearson also never provided a copy of said brief to Boswell to review, sign and make the necessary corrections before she filed his appeal.

Mr. Boswell's brief was DENIED as "improper format by attorney" filed on his behalf.

Mrs. Pearson was subsequently permanently disbarred for life as a result in 2012 after Boswell and several of her other clients all filed a complaint against her for unprofessional conduct with the State Disciplinary Board as he indicated in his **habeas corpus** application.

Boswell, who is unskilled in the art of law, did ask the prison inmate counsel to file an appeal to the Louisiana Supreme Court on the above 2nd Cir. DENIAL. Said Brief was filed and denied immediately as "Imcompletely Filed" on December 2, 2011.

Before his (2)years were up after completion of his direct appeal Boswell filed his first application for postconviction relief on May 8, 2012. The state listed the date as May 14, 2012. Thus said, the trial court sat on his PCR application for over a year before moving forward even after Boswell had made several inquires as to its progress.

Once Boswell's PCR was finally considered, an evidentiary hearing was granted and a contradictory attorney, Mr. Tristian P. Gilley, was assigned to represent him at said scheduled hearing.

ADA John Montgomery stated, in open court, at each of the (5) different evidentiary hearings that the State had lost Mr. Boswell's case file and then refused to answer the trial judge's question as to "Then why are you still holding Mr. Boswell in prison if you have no file on him?". The prosecution gave no reason and called for a sidebar. Mr. Boswell's PCR application was subsequently denied directly thereafter.

Attorney Gilley then filed an appeal of Boswell's PCR hearing to the 2nd Cir. COA without informing Boswell of the contents of his brief before filing, nor did he ever provide Boswell with a copy of said brief.

Appeal brief was DENIED without reason and Attorney Gilley then abandoned Boswell as his client. After finally learning of his appeal denial, Boswell subsequently filed (3) different motions

asking the appellate court to order Mr. Gilley to (1) provide him with a copy of his appeal brief, (2) to be allowed to check out the appellate court's record, and (3) requested an extention of time to file an appeal to the Louisiana Supreme Court, (docket no. 49,604 - KH), was assigned to the above (3) listed motions. The appellate court Granted and Ordered Attorney Gilley to provide Mr. Boswell with a copy of his requested court documents, but denied the remaining (2) motions as "Not Permitted."

As directed by the appellate court, Boswell then filed an appeal brief back to the 2nd Cir. COA against Gilley's appeal brief for the denial is Boswell PCR application to be reviewed on October 21, 2014, (docket no. 49,798 - KH), writ DENIED on December 18, 2014, without reason.

Immediately after receiving denial letter Boswell began to prepare a Supervisory Writ to the Louisiana Supreme Court and TIMELY filed said writ (11) days later on December 29, 2014.

LSC received writ January 6, 2015 and assigned (docket no. 2015 - KH - 0033) and mailed confirmation letter. HOWEVER, a huge discrepancy occured and somehow a court clerk looked up the wrong docket number in Boswell's case. (Docket no. 49,798 - KH) should have been reviewed, but inadvertently (docket no. 49,604 - KH) of the 2nd Cir. was reviewed instead, and as a result the LSC denied and dismissed Boswell case as "UNTIMELY" before the incident was detected and corrected.

Through many correspondences the discrepancy was eventually corrected and his writ was reinstated as "pending review by the

LSC" but no further movement was made.

Boswell also, on December 29, 2014, filed an "Application for Writ of Mandamus" to the appellate court, (docket no. KH - 15-49992) asking the court to order the district court to move forward in other civil legal matters. HOWEVER, when Boswell filed his appeal from that denial of the appellate court to the LSC docket numbers were AGAIN inadvertently mixed up, by the clerk, with LSC (docket no. 2015 - KH - 0033) along with the 2nd Cir. COA (docket no. 49,604 - KW) further complicating matters and this time the files were mixed up even worse.

Boswell wrote letters requesting a progress report to the LSC on the above docket number but got no response. On April 19, 2015, he placed a legal call to the clerk of the LSC inquiring a progress report of his writ. Clerk, after searching, advised Boswell that his writ had been lost and gave him permission to refile original writ and was granted a clean new (docket no. 2016 - KH - 0855).

Boswell, for the next 12 months, continued to monitor the progress of his writ either by phone, court website, or by written correspondence with the Court's response always being "writ still pending review".

Boswell, on May 19, 2017, received a DENIAL of his Supervisory Writ stating "WRIT NOT CONSIDERED as UNTIMELY FILED" due to the January 6, 2015, discrepancy from the fault of the appellate court and LSC court clerks. Even though Boswell had timely filed his brief (11) days after his denial from the appellate court and NO FAULT ON HIS PART he was still denied as "UNTIMELY."

Boswell's family member called the LSC Chief Clerk, Mr. Olivier, concerning the above denial and docket number mix-up. Clerk gave permission for Mr. Boswell to resubmit a new brief for the court to review.

As directed in the above, Boswell, in June 2017, refiled his original criminal brief on (docket no. 2016 - KH - 0855) and also filed an Application for Supervisory Writ on a civil legal matter from the denial of the 2nd Cir. COA (docket no. CW - 17-51615) to the LSC for both briefs to be reviewed.

LSC denied both writs stating AGAIN due to his untimely filing of writs his writs were "NOT CONSIDERED" and, therefore, Boswell had exhausted his state remedies for relief, EVEN THOUGH he had just been given permission by the Chief clerk to refile his writs because the courts had mixed up his docket numbers.

The federal district court in their R&R mentioned a denial of a reconsideration from the 2nd Cir. before Boswell went to the LSC. That denial was from a civil matter mentioned above and had nothing to do with his habeas corpus application time line and this Court should not consider that particular brief at this time.

HOWEVER, in his research, Boswell did find some new information in his case and, on September 25, 2017, filed a 2nd PCR application under "Newly Discovered Evidence" - claim (1) having NO PLEA AGREEMENT and claim (2) ineffective assistance of counsel. Trial court dismissed his application as "previously raised similar claims" on November 6, 2017.

Boswell filed writ, for review, to the 2nd Cir. COA (docket no. 52,110 - KH) which was denied on January 25, 2018 as "On the showing made, this writ is denied, La. C.Cr.P. art. 930.8."

Boswell, then filed Supervisory Writ to the LSC on February 5, 2018, from denial of the 2nd Cir.. Writ was received by clerk and assigned (docket no. 2018 - KH - 0350), however, Boswell did not receive a confirmation letter from the clerk. His family called the Chief Clerk, Mr. Olivier, and was advised that the court had not received said writ application and was told to refile his writ which was done by certified mail on March 1, 2018. Writ was given said docket number and confirmation letter was mailed.

"Writ still pending review" currently as Boswell has indicated in his habeas corpus relief application.

Boswell then prepared and on March 16, 2018, signed his Habeas Corpus Application, which he then sent by certified mail and was received by the clerk on July 5, 2018.

HOWEVER, just like most all of Boswell's writs filed in the state courts his habeas corpus application was received but filed in the wrong place where it remained lost or misfiled for 100 plus days until his family called the clerk of the federal district court's office and when his file was discovered, the clerk assigned (case no.: 5:18-CV-00873 SEC. P) and a Memorandum Order was granted on July 5, 2018. Boswell's file was then back dated to reflect the correct date his application was actually received on March 26, 2018, so as to not delay the timing of his habeas corpus.

LAW AND ANALYSIS

The statutory tolling provision of §2244(d)(2) provides that the time during which a properly filed application for post-conviction relief is pending in state court is not counted toward the limitation period. Ott v Johnson, 192 F.3d 510, 512 (5th Cir. 1999); Fields v Johnson, 159 F.3d 914, 916 (5th Cir. 1998).

A provision of 28 U.S.C. §2244(d)(2) sets a 1-year statute of limitations for seeking federal habeas relief from a state-court judgment is tolled while an "application for State post-conviction or other collateral review" "is pending." Read naturally, the statute's text means that the statute of limitations is tolled only while state courts review the application. A state post-conviction application "remains pending" "until the application has achieved final resolution through the State's postconviction procedures." Carey v Saffold, 536 U.S. 214, 220, 122 S.Ct. 2134, 153 L. Ed.2d 260 (2002).

Boswell's first post-conviction relief application had reached its final resolution through the State's postconviction procedures on May 19, 2017. But was later granted a Reconsideration because of the state mixing up his docket numbers and losing his file in the process. However, Boswell's Reconsideration was DENIED without further review on September 15, 2017. Therefore, when Boswell filed his Habeas Corpus Relief Application on March 26, 2018, he was within the 28 U.S.C. §2244(d)(2) 1-year statute of limitations allowed by congress.

Boswell's current 2nd post-conviction relief application

filed under "Newly Discovered Evidence" is "still pending" review in the LSC (docket no. 2018 - KH - 0350) and was denied by the federal district court, violating his constitutional right, that allowed him statutory tolling under the provision of §2244(d)(2).

Petitioner, Boswell, has shown true diligence in that he has continually filed his appeal briefs in a timely manner, and furthermore he has also shown that it was the State's fault that his briefs were not TIMELY due to the facts shown that the State has lost or mixed up his docket numbers between the appellate court and the Louisiana Supreme Court on more than one occasion. He has tried very hard and to no avail to clear up the State's mistakes in properly filing his appeals briefs.

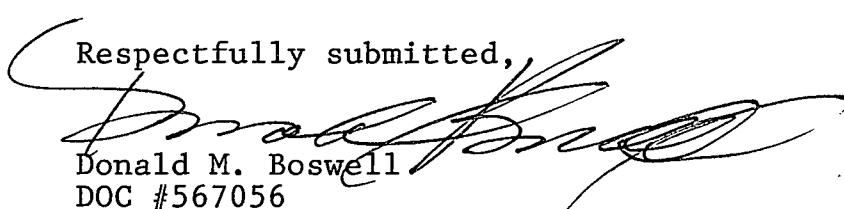
The record suggests that the state-created impediments that has prevented the filings of Boswell's petition for writ of habeas corpus in a timely manner, see 28 U.S.C. §2244(d)(1)(B), is due to the afore mentioned lost or mixed up docket numbers by the State.

CONCLUSION

The United State Supreme Court has held that the AEDPA's statute of limitations is subject to equitable tolling. See, Holland v Flordia, 560 U.S. 631, 645 (2010). A petitioner bears the burden of proof to invoke equitable tolling. See, Alexander v Cockrell, 294 F.3d 626, 696 (5th Cir. 2002). Wherefore, the Petitioner, Donald Boswell, is entitled to equitable tolling because he has shown (1) that he has been pursuing his rights

diligently, and (2) that because of the fault of the State some extraordinary circumstances stood in his way and prevented timely filing. Therefore, the AEDPA's statute of limitations can be properly applied to Boswell's application for writ of habeas corpus in his particular case and for these reasons stated, Boswell prays this Honorable Court issue him a COA on the grounds set forth in his brief in support. He further prays for any other and further relief which this Court may deem necessary, just and proper under the circumstances.

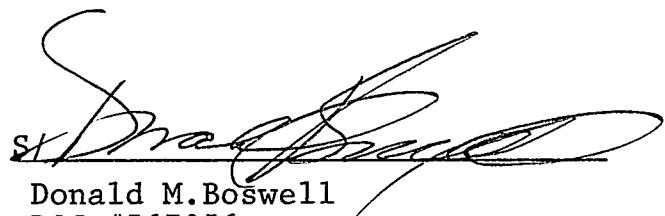
Respectfully submitted,


Donald M. Boswell
DOC #567056
David Wade Correctional Center
670 Bell Hill Road - N5D
Homer, LA 71040-2150

Petitioner

CERTIFICATE OF SERVICE

Applicant, Donald M. Boswell, hereby certifies that a true and correct copy of the following foregoing "Brief in Support of Application for a Certificate of Appealability" has been served to the Appellee/Respondent by placing same in the U.S. Mail with First Class Postage prepaid, addressed as indicated below, on this 10th day of September, 2018.



Donald M. Boswell
DOC #567056

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
=====

NO. 18-30931
=====

DONALD M. BOSWELL CIVIL ACTION
VERSUS U.S.D.C. NO.: 5:18-CV-873
SECTION: P
STATE OF LOUISIANA JUDGE: S. MAURICE HICKS, JR.

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

MAY IT PLEASE THIS COURT:

COMES NOW, Donald M. Boswell, Applicant herein, requesting a Certifiacte of Appealability pursuant to Federal Rule Appellate Procedure, Rule 22(b), and 28 U.S.C. Sec. 2253(c)(2).

1.

On August 3, 2018, the District Court issued a final order denying Applicant's Petition For Writ Of Habeas Corpus and denied him a Certificate of Appealability.

On August 7, 2018, Applicant submitted with the district court his Notice of Appeal and Motion to proceed on appeal as a pauperis while on appeal in this Court.

On August 10, 2018, the Clerk for the United States Western District notified Applicant that the Notice of Appeal and Motion to Proceed as a Pauperis had been received and; that the

Applicant had been granted leave to proceed as a pauperis while on appeal in this Fifth Circuit and that the COA had been referred to the district judge.

On August 3, 2018 , the District Court filed an order of denial, denying Applicant's Certificate of Appealability to appeal the issues denied to the Fifth Circuit Court of Appeals.

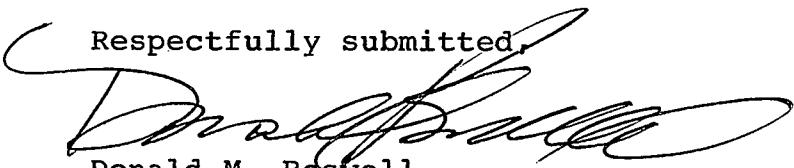
2.

Since the district court has denied a COA, Applicant must now seek a COA in this Honorable Court before his Appellant's Brief can be heard by the Court of Appeal. See §102 and 103 of the New Effective Death Penalty Act (AEDPA), amending 28 U.S.C. Sec. 2253 and F.R.A.P. 22(b).

3.

Applicant now seeks a Certificate of Appealability in this Honorable Court, the Fifth Circuit Court of Appeal.

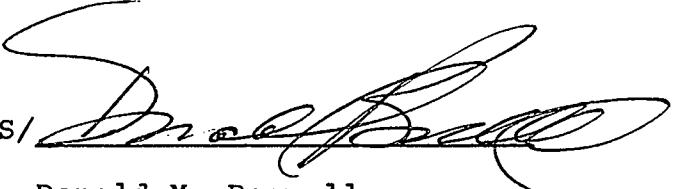
Respectfully submitted,


Donald M. Boswell
DOC #567056

CETIFICATE OF SERVICE

Applicant Donald M. Boswell , hereby certifies that a true and correct copy of the foregoing "Application For A Certificate Of Appealability and Brief in Support" has been served to the Appellee/Respondent by placing same in the U.S. Mail with First Class Postage prepaid, addressed as indicated below, on this 10th day of September, 2018.

s/


Donald M. Boswell
DOC #567056

NOTICE FROM U.S. DISTRICT COURT - WESTERN DISTRICT OF LOUISIANA

Donald M Boswell (PrisID: 567056)
David Wade Correctional Center
670 Bell Hill Rd
Homer, LA 71040

Case: 5:18-cv-00873 NEF 4729542
2 pages printed: Fri Sep 14 7:01:34 2018

U.S. District Court

Western District of Louisiana

Notice of Electronic Filing

The following transaction was entered on 9/14/2018 at 5:14 AM CDT and filed on 9/13/2018

Case Name: Boswell v. Louisiana

Case Number: 5:18-cv-00873-SMH-JPM

Filer:

WARNING: CASE CLOSED on 08/03/2018

Document Number: No document attached

Docket Text:

ELECTRONICALLY CERTIFIED Record on Appeal to US Court of Appeals re [11] Notice of Appeal is now available to Appellate Counsel via the 5th Circuit Court of Appeals website. See Instructions for Access and Use of the Electronic Record Download Feature of CM/ECF by [clicking here](#). (USCA #18-30931)

If you do not have access to the Electronic Download Feature of CM/ECF, please submit your request for the certified record on appeal to the District Court.

(crt,WalkerSld, B)

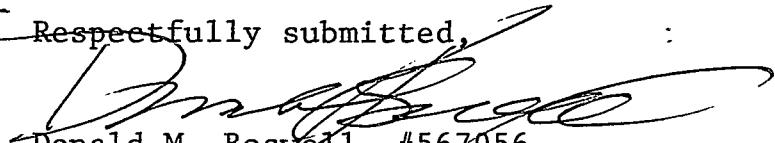
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DONALD M. BOSWELL #567056
VERSUS
STATE OF LOUISIANA

CASE NO. 5:18-CV-00873 SEC P
CHIEF JUDGE HICKS
MAGISTRATE JUDGE PEREZ-MONTES

MOTION REQUESTING CERTIFIED RECORD

NOW INTO THIS HONORABLE COURT, comes the Petitioner, who respectfully request a full and complete copy of his certified record on appeal to the District Court from the Ruling of the 5th Circuit Court of Appeals dated 9/14/2018 Granting his Certificate of Appellability, case number 18-30931.

Respectfully submitted,

Donald M. Boswell, #567056

O R D E R

IT IS ORDERED that petitioner be allowed a full and complete copy of his certified record on appeal to proceed in this action.

THUS DONE AND SIGNED in Chambers on this _____ day of _____, 2018.

United States Magistrate Judge

Mr. Donald M. Boswell
#567056
David Wade Correctional Center
670 Bell Hill Road
Homer, LA 71040-0000

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 02, 2019

Mr. Tony R. Moore
Western District of Louisiana, Shreveport
United States District Court
300 Fannin Street
Suite 1167
Shreveport, LA 71101-0000

No. 18-30931 Donald Boswell v. State of Louisiana, et al
USDC No. 5:18-CV-873

Dear Mr. Moore,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By:

Lisa E. Ferrara, Deputy Clerk
504-310-7675

cc w/encl:

Mr. Donald M. Boswell

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-30931



Certified as a true copy and issued
as the mandate on Apr 02, 2019

Attest: *Jyl W. Guye*
Clerk, U.S. Court of Appeals, Fifth Circuit

DONALD M. BOSWELL,

Petitioner-Appellant

v.

STATE OF LOUISIANA; JERRY GOODWIN, WARDEN, DAVID WADE
CORRECTIONAL CENTER,

Respondents-Appellees

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

ORDER:

Donald M. Boswell, Louisiana prisoner # 567056, has applied for a certificate of appealability (COA) to challenge the dismissal, as time barred, of his 28 U.S.C. § 2254 petition. He filed the § 2254 petition to attack his guilty plea conviction of attempted aggravated rape, for which he was sentenced to a 48-year term of imprisonment.

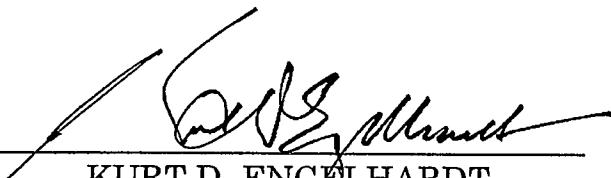
To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Where, as here, the district court denies habeas relief on procedural grounds, the COA applicant must demonstrate that reasonable jurists would find it debatable whether the application states a valid claim of

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the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484.

Boswell contends that, due to several alleged errors by state court officials in processing his post-conviction filings, his § 2254 petition should be considered timely filed through application of 28 U.S.C. § 2244(d)(1)(B) because he encountered state-created impediments. He also asserts that he is entitled to equitable tolling on account of the alleged state court processing errors and his diligence in pursuing relief.

Because he has failed to make the requisite showing, Boswell's application for a COA is DENIED.



KURT D. ENGELHARDT
UNITED STATES CIRCUIT JUDGE