IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Raleigh D. Wiggins, **Petitioner,**	)	
v.	)	**1:16cv898 (GBL/IDD)**
Eddie Pearson, **Respondent.**	)	

ORDER

THIS MATTER comes before the Court on initial review of petitioner's writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. This case concerns claims asserted by Petitioner, Raleigh D. Wiggins, a Virginia inmate proceeding pro se. The issue before the Court is whether petitioner timely filed his petition. The Court concludes that Petitioner must provide further information regarding whether the statute of limitations applies to this petition or should otherwise be tolled. Petitioner has submitted the requisite filing fee.

It appears that the applicable statute of limitations, 28 U.S.C. § 2244(d), bars the claims presented. A petition for a writ of habeas corpus must be dismissed if filed later than one year after (1) the judgment becomes final; (2) any state-created impediment to filing a petition is removed; (3) the United States Supreme Court recognizes the constitutional right asserted; or (4) the factual predicate of the claim could have been discovered with due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D).

In the instant case, petitioner was convicted on September 22, 2009, in the Circuit Court of the City of Virginia Beach, Virginia. Petitioner filed a direct appeal in the Virginia Court of Appeals, which denied his petition for appeal on May 4, 2010. Petitioner did not file a direct

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appeal of these convictions in the Supreme Court of Virginia. Thus, these convictions became final thirty days later, on June 3, 2010. United States v. Williams, 139 F.3d 896 (table), 1998 WL 120116 (4th Cir. Mar. 5, 1998) at *2 ("Under Virginia law, a conviction is final thirty days after the entry of the judgment of conviction.").

In calculating the one-year period, however, the Court must exclude the time during which state collateral proceedings pursued by petitioner were pending. See 28 U.S.C. § 2244(d)(2); Pace v. DiGuglielmo, 544 U.S. 408 (2005) (determining that the definition of "properly filed" state collateral proceedings, as required by § 2244(d)(2), is based on the applicable state law as interpreted by state courts). Although the chronology of petitioner's postconviction proceedings is not completely clear, it appear as though petitioner commenced his first postconviction proceeding on July 10, 2015, and that the Supreme Court of Virginia refused the petition for appeal on May 20, 2016. Petitioner filed the instant petition on June 30, 2016.[1]

Between June 3, 2010, the date petitioner's conviction became final, and July 10, 2015, the date petitioner filed his state habeas petition, over five years passed. Between May 20, 2016, the date the denial of petitioner's state habeas petition became final, and June 30, 2016, the date petitioner filed his federal petition, an additional forty (40) days passed. When these days are combined they establish that the instant petition was filed well over four years beyond the one-year limit. Accordingly, the petition is untimely under § 2244(d), unless petitioner can establish that the statute of limitations does not apply or should otherwise be tolled. See Hill v. Braxton, 277 F.3d 701, 707 (4th Cir. 2002) (requiring notice and the opportunity to respond

[1] For purposes of calculating the statute of limitations, a petition is deemed filed when the prisoner delivers his pleading to prison officials. Lewis v. City of Richmond Police Dep't, 947 F.2d 733 (4th Cir. 1991).

before a sua sponte dismissal under § 2244(d)). At this point petitioner has not presented facts supporting such tolling but he will be given an opportunity to do so.

Accordingly, it is hereby

ORDERED that the petition be and is conditionally filed pending compliance with the requirements of this Order; and it is further

ORDERED that this petition will be dismissed as barred by the statute of limitations unless, within thirty (30) days, petitioner contests the application of the one-year statute of limitations or establishes that he is entitled to equitable tolling. To establish this entitlement petitioner must present affidavits (sworn statements subject to the penalty of perjury) or other material contesting the application of the statute limitations pursuant to 28 U.S.C. § 2244(d); and it is further

ORDERED that petitioner's failure to comply with any part of this Order within THIRTY (30) DAYS FROM THE DATE OF THIS ORDER, or failure to notify this Court immediately upon being transferred, released, or otherwise relocated, may result in the dismissal of this complaint pursuant to Fed. R. Civ. P. 41(b).

The Clerk is directed to send a copy of this Order to petitioner.

Entered this 29th day of July 2016.

Alexandria, Virginia

/s/
Gerald Bruce Lee
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Raleigh D. Wiggins, **Petitioner,**	)	
v.	)	**1:16cv898 (GBL/IDD)**
Eddie Pearson, **Respondent.**	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on respondent's Motion to Dismiss. Petitioner, Raleigh D. Wiggins, a Virginia inmate proceeding pro se, has filed a 28 U.S.C. § 2254 habeas corpus petition in which he challenges the constitutionality of the revocation of his suspended sentence. Respondent has filed a Motion to Dismiss arguing that the instant petition is untimely. Dkt. No. 15. Petitioner filed a response. Dkt. No. 21. The issue before the Court is whether the instant habeas corpus was timely filed. The Court concludes that the petition was not timely filed, and therefore, respondent's Motion to Dismiss will be granted.

A petition for a writ of habeas corpus must be dismissed if filed later than one year after (1) the judgment becomes final; (2) any state-created impediment to filing a petition is removed; (3) the United States Supreme Court recognizes the constitutional right asserted; or (4) the factual predicate of the claim could have been discovered with due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). In the instant case, petitioner's suspended sentence was revoked in the Circuit Court of the City of Virginia Beach, Virginia. Petitioner filed a direct appeal in the Virginia Court of Appeals, which denied his petition for appeal on May 4, 2010. Petitioner did not file a direct appeal of the revocation in the Supreme Court of Virginia. Thus, the revocation

APPENDIX E (1 of 4)

became final thirty days later, on June 3, 2010. United States v. Williams, 139 F.3d 896 (table), 1998 WL 120116 (4th Cir. Mar. 5, 1998) at *2 ("Under Virginia law, a conviction is final thirty days after the entry of the judgment of conviction.").

In calculating the one-year limitations period, courts normally must exclude the time during which state collateral proceedings pursued by petitioner were pending. See 28 U.S.C. § 2244(d)(2); Pace v. DiGuglielmo, 544 U.S. 408 (2005) (determining that the definition of "properly filed" state collateral proceedings, as required by § 2244(d)(2), is based on the applicable state law as interpreted by state courts). Here, however, petitioner did not commence his first postconviction proceeding until September 23, 2011, when he filed his state habeas petition in the Supreme Court of Virginia. At that time, 475 days had elapsed since the revocation of petitioner's suspended sentence became final and therefore, the federal statute of limitations had expired and the pendencies of any state habeas proceedings could not toll the limitations period. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed."); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000) (holding that a state postconviction motion filed after expiration of the limitations period cannot toll the period, because there is no period remaining to be tolled); Rashid v. Khulmann, 991 F.Supp. 254, 259 (S.D.N.Y. 1998) ("Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations."). Accordingly, the petition would be untimely under § 2244(d), unless petitioner can establish that the statute of limitations does not apply or should otherwise be tolled. See Hill v. Braxton, 277 F.3d 701, 707 (4th Cir. 2002) (requiring notice and the opportunity to respond before a sua sponte dismissal under § 2244(d)). Specifically, here, because the statute of limitations had run prior to petitioner filing his first state habeas petition, the

instant petition is untimely if petitioner cannot establish that he is entitled to equitable tolling for the time period between June 3, 2010 and September 23, 2011.

To qualify for equitable tolling, a petitioner must demonstrate that (1) he had been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his way and prevented timely filing. Id. at 649, citing Pace, 544 U.S. at 418. A petitioner asserting equitable tolling "'bears a strong burden to show specific facts'" that demonstrate fulfillment of both elements of the test. Yang v. Archuleta, 525 F.3d 925, 928 (10th Cir. 2008) (quoting Brown v. Barrow, 512 F.3d 12304, 1307 (11th Cir. 2008)). The petitioner generally is obliged to specify the steps he took in diligently pursuing his federal claim. Spencer v. Sutton, 239 F.3d 626, 630 (4th Cir. 2001); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998). In addition, the petitioner must "demonstrate a causal relationship between the extraordinary circumstance on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the circumstances." Valverde v. Stinson, 224 F.3d 129, 134 (2d Cir. 2000). It is widely recognized that equitable tolling is to be applied only infrequently. Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) ("We believe, therefore, that any resort to equity must be reserved for those rare instances where - due to circumstances external to the party's own conduct - it would be unconscionable to enforce the limitation period against the party and gross injustice would result.").

Here, petitioner has not established that he was diligently pursuing his right between June 3, 2010, and September 23, 2011. Petitioner has attached several documents showing his attempts to obtain transcripts of his criminal hearings, as well as the many petitions he filed in state court seeking post-conviction relief; however, none of these documents show that petitioner took these actions prior to September 23, 2011. Specifically, the documents show that the first

post-conviction relief plaintiff sought was the state habeas petition filed in the Supreme Court of Virginia on September 23, 2011, and that the first time he sought copies of his transcripts was around September 2012. Therefore, petitioner has not shown specifics facts that demonstrate that he was diligently pursuing his rights between June 3, 2010, and September 23, 2011. Finally, plaintiff's argument that he is pro se and is ignorant of the law is insufficient to establish that he is entitled to equitable tolling. United States v. Oriakhi, 394 F. App'x 976, 977 (4th Cir. 2010) ("[U]nfamiliarity with the legal process or ignorance of the law cannot support equitable tolling."). Accordingly, respondent's Motion to Dismiss (Dkt. No. 15) is GRANTED, and it is hereby

ORDERED that this petition be and is DISMISSED, WITH PREJUDICE, as time-barred.

To appeal this decision, petitioner must file a written notice of appeal with the Clerk's Office within thirty (30) days of the date of this Order. A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order petitioner wants to appeal. Petitioner need not explain the grounds for appeal until so directed by the Court. Failure to timely file a notice of appeal waives the right to appeal this decision. Petitioner must also request a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253 and Fed. R. App. P. 22(b). For the reasons stated above, this Court expressly declines to issue such a certificate.

The Clerk is directed to enter final judgment in favor of respondent Eddie Pearson, pursuant to Fed. R. Civ. P. 58, to send a copy of this Memorandum Opinion and Order to petitioner and to counsel of record for respondent, and to close this civil action.

Entered this 22nd day of February 2017.

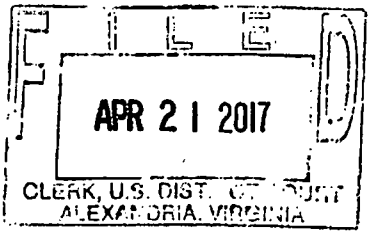
Alexandria, Virginia

/s/

Liam O'Grady
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division



Raleigh D. Wiggins,
Petitioner,

v.

Director of Dept. of Corrections,
Respondent.

1:17cv417 (GBL/MSN)

ORDER

THIS MATTER comes before the Court on initial review of petitioner's writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his probation revocation in the Circuit Court for the City of Virginia Beach. Petitioner previously filed a § 2254 habeas corpus petition regarding his probation revocation, which was reviewed and dismissed on the merits as time barred. Wiggins v. Pearson, 1:16cv898 (E.D. Va. February 22, 2017). Title 28 U.S.C. § 2244(b) compels the district court to dismiss a second or successive habeas corpus petition absent an order from a panel of the court of appeals authorizing the district court to review such a petition. The court of appeals will only authorize such a review if a petitioner can show that (1) the claim has not been previously presented to a federal court on habeas corpus, and (2) the claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, or the claim relies on facts which could not have been previously discovered by due diligence and which show "by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). Petitioner has neither provided an appropriate order from the United States Court of Appeals for the Fourth Circuit nor demonstrated his compliance with the standard for obtaining a certificate from the Fourth Circuit

pursuant to § 2244(b)(2)(B). Therefore, this Court lacks jurisdiction to consider this successive petition.

Accordingly, it is hereby

ORDERED that this action be and is DISMISSED, WITHOUT PREJUDICE to petitioner's right to move a panel of the United States Court of Appeals for the Fourth Circuit for an order authorizing this Court to consider the petition.

To appeal, petitioner must file a written notice of appeal with the Clerk's Office within thirty (30) days of the date of this Order. A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order petitioner wants to appeal. Petitioner need not explain the grounds for appeal until so directed by the court. Failure to timely file a notice of appeal waives the right to appeal this decision. Petitioner must also request a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253 and Fed. R. App. P. 22(b). This Court expressly declines to issue such a certificate.

The Clerk is directed to send a copy of this Order and a standard § 2244 form to petitioner and to close this civil case.

Entered this 21st day of April 2017.

Alexandria, Virginia

/s/
Gerald Bruce Lee
United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6610

RALEIGH D. WIGGINS,

Petitioner - Appellant,

v.

DIRECTOR OF DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:17-cv-00417-GBL-MSN)

Submitted: July 20, 2017 Decided: July 25, 2017

Before DUNCAN and WYNN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Raleigh D. Wiggins, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

APPENDIX G (1 of 2)

PER CURIAM:

Raleigh D. Wiggins seeks to appeal the district court's order dismissing as successive his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Wiggins has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Raleigh D. Wiggins, **Petitioner,**	)	
v.	)	**1:16cv898 (AJT/IDD)**
Eddie Pearson, **Respondent.**	)	

ORDER

Petitioner, a Virginia inmate proceeding pro se, has filed a 28 U.S.C. § 2254 habeas corpus petition in which he challenges the constitutionality of the revocation of his suspended sentence. On November 22, 2016, respondent filed a Motion to Dismiss arguing that the instant petition was untimely. Dkt. No. 15. On December 9, 2016, petitioner filed a response. Dkt. No. 21. By Order dated February 22, 2017, this petition was dismissed as untimely. Dkt. No. 22. Specifically, it was determined that petitioner's revocation became final on June 3, 2010, but that he did not commence his first postconviction proceeding until September 23, 2011, at which point 475 days had elapsed since the revocation of petitioner's suspended sentence became final, and therefore, the federal statute of limitations had expired and the pendencies of any state habeas proceedings could not toll the limitations period. Id. It was also determined that petitioner did not established that he was diligently pursuing his right between June 3, 2010, and September 23, 2011, and thus, he was not entitled to equitable tolling. Id. Petitioner did not appeal.

Petitioner has now filed a Production of Requested Materials as Ordered by the Judge, in which he states that he is responding to the July 29, 2016 Order in this matter directing petitioner

APPENDIX H (1 of 3)

to establish that he is entitled to equitable tolling. Specifically, petitioner argues that he has "recently discovered" evidence that establishes that he was not able to file his state habeas petition until September 23, 2011, because he did not receive his case file from his trial attorney until August 15, 2011. Construed liberally, this letter will be taken as a Motion for Reconsideration.

Petitioner appears to be basing his argument on newly discovered evidence. Relief under Rule 59 of the Federal Rules of Civil Procedure is available only "to account for new evidence not available at trial ...." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Relief under Rule 60(b)(2) is available based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b) ...." Here, the evidence petitioner provides to try to establish equitable tolling is not new. At the time the instant petition was filed, as thus also at the time petitioner was asked to establish whether he was entitled to equitable tolling, petitioner clearly knew that he did not receive his case file from trial counsel until August 15, 2011. Because there is no newly discovered evidence, petitioner has not established that he is entitled to relief.

Accordingly, it is hereby

ORDERED that petitioner's Motion for Reconsideration [Dkt. No. 24] be and is DENIED.

To appeal this decision, petitioner must file a written notice of appeal with the Clerk's Office within thirty (30) days of the date of this Order. A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order petitioner wants to appeal. Petitioner need not explain the grounds for appeal until so directed by the Court.

Failure to timely file a notice of appeal waives the right to appeal this decision. Petitioner must also request a certificate of appealability from a circuit justice or judge. See 28 U.S.C. § 2253 and Fed. R. App. P. 22(b). For the reasons stated above, this Court expressly declines to issue such a certificate.

The Clerk is directed to send a copy of this Order to petitioner and to counsel of record for respondent.

Entered this 14th day of November 2018.

Alexandria, Virginia

/s/
Anthony J. Trenga
United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7505

RALEIGH D. WIGGINS,

Petitioner - Appellant,

v.

EDDIE PEARSON, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:16-cv-00898-AJT-IDD)

Submitted: April 25, 2019 Decided: April 29, 2019

Before FLOYD and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Raleigh D. Wiggins, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Raleigh D. Wiggins seeks to appeal the district court's order denying his Fed. R. Civ. P. 60(b) motion for reconsideration of the district court's order denying relief on his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012); *Reid v. Angelone*, 369 F.3d 363, 369 (4th Cir. 2004), *abrogated in part on other grounds by United States v. McRae*, 793 F.3d 392, 400 & n.7 (4th Cir. 2015). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Wiggins has not made the requisite showing. Accordingly, we deny a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

Additional material from this filing is available in the Clerk's Office.