

FILED: August 26, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6407
(2:18-cv-00592-RAJ-LRL)

ELMUIZ ABDU

Petitioner - Appellant

v.

HAROLD W. CLARKE, Director of Virginia Department of Corrections

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-6407

ELMUIZ ABDU,

Petitioner - Appellant,

v.

HAROLD W. CLARKE, Director of Virginia Department of Corrections,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (2:18-cv-00592-RAJ-LRL)

Submitted: August 22, 2019

Decided: August 26, 2019

Before KING and RICHARDSON, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Elmuiz Abdu, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Elmuiz Abdu seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing as untimely 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 Abdu 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

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

ELMUIZ ABDU,

Petitioner,

v.

Civil Action No. 2:18-cv-592

**HAROLD W. CLARKE, Director,
Virginia Department of Corrections,**

Respondent.

REPORT AND RECOMMENDATION

This matter is before the Court on *pro se* Petitioner Elmuzi Abdu's ("Petitioner") Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 ("the Petition"), ECF No. 1, and Respondent, Harold W. Clarke, Director, Virginia Department of Corrections' ("Respondent") Motion to Dismiss the Petition for Writ of Habeas Corpus. ECF No. 10. The matter was referred for disposition to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), Federal Rule of Civil Procedure 72(b), Eastern District of Virginia Local Civil Rule 72, and the April 2, 2002, Standing Order on Assignment of Certain Matters to United States Magistrate Judges. For the following reasons, the undersigned **RECOMMENDS** that Respondent's Motion to Dismiss, ECF No. 10, be **GRANTED**, and the Petition, ECF No. 1, be **DISMISSED WITH PREJUDICE**.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 3, 2000, Petitioner pled guilty in the Circuit Court of Fairfax County, Virginia (“Trial Court”) and was convicted of Murder. ECF No. 9, attach. 1 at 34. On May 3, 2001, Petitioner was sentenced by the Trial Court and is currently serving a thirty-one-year sentence. *Id.* Petitioner is incarcerated at Deerfield Correctional Center, a facility owned and operated by the Virginia Department of Corrections (“VDOC”). *Id.* In the matter before the Court, Petitioner challenges the calculation and application of his good time credit for 439 days, for the period between June 4, 2000, and August 17, 2001, when he was incarcerated in the Fairfax County Adult Detention Center (“Fairfax County Jail”). ECF No. 1 at 3; ECF No. 9, attach. 1 at 34.

Petitioner filed a § 2254 Writ of Habeas Corpus with the Trial Court on April 1, 2016, claiming that Petitioner had not been given earned good time credit for 439 days of time as required by Va. Code §§ 53.1-116 and -202.2.¹ ECF No. 9, attach. 1 at 7, 12. On May 27, 2016, the Trial Court dismissed Petitioner’s state habeas petition, finding that Petitioner had been appropriately credited with the good time credits he was owed. *Id.*, attach. 1 at 44-45. On July 28, 2016, Petitioner appealed to the Supreme Court of Virginia alleging that the Trial Court erred in denying Petitioner’s state habeas petition. *Id.*, attach. 2 at 3-15. Specifically, Petitioner argued that the Trial Court erred by: (1) entertaining Respondent’s motion to dismiss the petition and rejecting Petitioner’s response to the motion to dismiss; (2) failing to provide Petitioner with the same opportunity given to Respondent in filing their motion to dismiss; and (3) failing to provide an evidentiary hearing. *Id.*, attach. 2 at 6. On March 23, 2017, the Supreme Court of

¹ Although Petitioner indicates his in Petition that his state habeas petition to the Trial Court was grounded in Virginia Code §§ 53.1-32.1, -116, -189 thru -202.4, and Operating Procedure 830.3, ECF No. 1 at 3, Petitioner’s state habeas petition actually only lists §§ 53.1-116 and -202.2 as a basis for his claim, ECF No. 9, attach. 1 at 7.

Virginia found that the Trial Court committed no reversible error and refused Petitioner's state habeas petition. *Id.*, attach. 2 at 19.

Petitioner filed a *pro se* Section 2254 petition for federal habeas relief in the United States District Court for the Western District of Virginia on October 30, 2017. ECF No. 1. Giving Petitioner the benefit of liberal construction, Petitioner appears to allege a similar claim to that alleged in his state habeas, namely, that he was denied good conduct time. However, Petitioner does not base this denial on a violation of the Virginia Code, but rather couches his instant claim as a due process violation.² *Id.* at 3, 5. Petitioner states that Respondent acted improperly in calculating his good time credit while in Fairfax County Jail under the new 85% law, when it should properly be calculated under prior law. ECF No. 1 at 14. On April 16, 2018, Respondent filed a Rule 5 Answer, *Roseboro* Notice, Motion to Dismiss, and Memorandum in Support of Motion to Dismiss. ECF Nos. 9-12. Petitioner requested additional time to respond to Respondent's Motion to Dismiss, ECF No. 13, which the Court granted, giving Petitioner until May 22, 2018, to file a response, ECF No. 14. On May 25, 2018,³ Petitioner filed an opposition

² Petitioner only provided one ground for relief, which is captioned "[t]he ability to earn good time is too speculative to call for due process protections" and states in the supporting facts and law that "the Constitutional right to deprivation of good time requires due process protections where the relevant statutes or regulations sufficiently limit prison officials' discretion in taking or not providing petition with the earned good time credit is a deprivation of liberty even if statutes and regulations do not limit discretion to take it away." ECF No. 1 at 5. Petitioner does not state any facts to support his claim and his ground is also not terribly clear. However, giving Petitioner the benefit of liberal construction, the Court construes Petitioner's Ground One to be a claiming a due process violation as supported by the facts detailed in Petitioner's opposition. ECF No. 15.

³ Although the Petitioner's opposition was not received and filed by the Clerk's Office until May 25, 2018, three days after it was due, the undersigned affords Petitioner the benefit of the "prison mailbox rule," which deems prisoner court filings to be "filed" as of the date that the documents are given to prison authorities for mailing. ECF No. 15; see *Houston v. Lack*, 487 U.S. 266, 276 (1988) and Rule 3(d) of the Rules Governing Section 2254 Cases in the United States District Courts; see also *Booker v. Clarke*, No. 1:15CV781, 2016 WL 4718951, at *4 (E.D. Va. Sept. 8, 2016), *appeal dismissed*, 678 F. App'x 152 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 234, (2017), *reh'g denied*, 138 S. Ct. 538, 199 L. Ed. 2d 414 (2017) ("For federal purposes, a pleading submitted by an incarcerated litigant acting *pro se* is deemed filed when it is delivered to prison officials for mailing."). Here, the Certificate of Service affixed to the Petition bears a signature date of May 18, 2018. See ECF No. 1 at 4. Therefore, Petitioner's opposition has been timely filed.

to Respondent's Motion to Dismiss. ECF No. 15. Respondent filed no reply and the time for doing so has expired. Thereafter, on November 8, 2018, the United States District Court for the Western District of Virginia found that proper venue exists in the Eastern District of Virginia and transferred Petitioner's case to this Court for resolution. ECF Nos. 16-17. Accordingly, Respondent's Motion to Dismiss, ECF No. 10, is ripe for recommended disposition.

II. DISCUSSION

In the instant matter, Petitioner contests the calculation of good time credit for 439 days he served in Fairfax County Jail between June 4, 2000, and August 17, 2001. ECF Nos. 1 at 3 and 11 at 2. Specifically, Petitioner appears to contend that the calculation of his good conduct time amounts to a violation of Petitioner's Fourteenth Amendment due process right. ECF No. 1 at 5. Petitioner further elaborates by stating "the United States Constitution itself does not create a protected liberty interest for prisoners earning good conduct credits. Yet, state laws, as well as the Constitution, can create protected liberty interests under the Fourteenth Amendment." ECF No. 15 at 3. Thus, the Court construes Petitioner's Ground One to be alleging a violation of Petitioner's due process rights.

A. Statute of Limitations

Before the Court can consider the merits of a Petitioner's claim it must ensure Petitioner has complied with procedural requirements for federal habeas review. Section 101 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") amended 28 U.S.C. § 2244 to establish a one-year period of limitation within which a petitioner must file a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court. 28 U.S.C. § 2244(d) provides:

1. A 1-year period of limitation shall apply to any application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

2. The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Petitioner now challenges the execution of his sentence rather than the judgement of conviction.

Therefore, § 2244(d)(1)(D) determines the date upon which the limitations period begins to run.

See Karim v. Pearson, 2017 U.S. Dist. LEXIS 121976, at *8 (E.D. Va. Aug. 1, 2017). Thus, the date on which the statute of limitations began to run for Petitioner's due process claim for improper calculation of his good time credit is the date Petitioner could have discovered, through the exercise of reasonable diligence, that VDOC made the alleged improper calculation of Petitioner's good conduct time.

It is not entirely clear from the record presently before the Court when Petitioner could have, with reasonable diligence, discovered the alleged miscalculation of his good time credit for the time he served in Fairfax County Jail between June 4, 2000, and August 17, 2001, that serves

as the factual basis for his Petition. However, even giving Petitioner the benefit of the date he received a January 28, 2016 letter from VDOC responding to Petitioner's inquiry about the calculation of his good conduct time—a date when Petitioner clearly knew of the alleged miscalculation—Petitioner has exceeded the one-year statute of limitations under AEDPA. ECF No. 1, attach. 1 at 1. Petitioner made a “written inquiry . . . regarding [Petitioner's] time computation and projected release date,” which VDOC responded to by way of written correspondence on January 28, 2016, explaining VDOC's calculation and how those calculations relate to Petitioner's good time credit and projected release date. *Id.* Since it is clear that Petitioner was, in fact, aware of the alleged good conduct time miscalculation at least as early as January 28, 2016, Petitioner would have had one-year from that date to file a habeas petition alleging his instant claim.⁴ Thus, to be timely under AEDPA, Petitioner would have had to file the instant Petition by January 28, 2017. The instant Petition was filed on October 30, 2017, approximately nine months after Petitioner's deadline to file had passed. ECF No. 1.

Notably, Petitioner is not entitled to the grace period provided by § 2244(d)(2) because Petitioner's state habeas petition was not “with respect to the pertinent judgment or claim [that] is pending.” As discussed *supra*, while the underlying factual basis serves as the foundation for both Petitioner's state and federal claims—i.e., the alleged denial of good conduct time—the state law claims Petitioner made in his state habeas petition are dissimilar from the constitutional

⁴ Notably, Respondent appended several documents to its Rule 5 Response, ECF No. 9, including Petitioner's state habeas petition filed with the Trial Court, ECF No. 9, attach. 1 at 3-13. Additional documents appear immediately following Petitioner's state habeas petition and supporting memorandum and it is unclear to the Court whether these documents were exhibits appended by Petitioner to his state habeas petition. These documents include the January 28, 2016 letter from VDOC responding to Petitioner's inquiry, *id.* attach. 1 at 14, and a September 16, 2009 VDOC Legal Update showing Petitioner's good time credit and his projected release date. Because it is unclear whether Petitioner was in possession of the September 16, 2009 Legal Update, the Court declines to utilize this document as evidence that Petitioner was aware of his good time credit calculation, and the alleged miscalculation, as of that date.

claims Petitioner is presently asserting.⁵ Thus, the undersigned **FINDS** that Petitioner filed the instant Petition outside the statute of limitations set by AEDPA, and therefore, the Court may not consider the merits of the Petition.

III. RECOMMENDATION

For the reasons stated herein, the undersigned **RECOMMENDS** that Respondent's Motion to Dismiss, ECF No. 10, be **GRANTED**, and the Petition, ECF No. 1, be **DENIED AND DISMISSED WITH PREJUDICE**.

IV. REVIEW PROCEDURE

By receiving a copy of this Report and Recommendation, the parties are notified that:

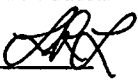
1. Any party may serve on the other party and file with the Clerk of the Court specific written objections to the above findings and recommendations within fourteen days from the date this Report and Recommendation is mailed to the objecting party, computed pursuant to Federal Rule of Civil Procedure Rule 6(a) plus three days permitted by Federal Rule of Civil Procedure Rule 6(d). A party may respond to another party's specific written objections within fourteen days after being served with a copy thereof. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

2. A United States District Judge will make a *de novo* determination of those portions of this Report and Recommendation or specified findings or recommendations to which objection is made. The parties are further notified that failure to file timely specific written objections to the above findings and recommendations will result in a waiver of the right to appeal from a judgment of this Court based on such findings and recommendations. *Thomas v. Arn*, 474 U.S.

⁵ As noted, Petitioner's state habeas petition alleged Respondent miscalculated his good conduct time under the Virginia Code. The instant federal petition alleges Respondent's good conduct time calculation violated Petitioner's constitutional due process rights, a substantially different claim.

140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

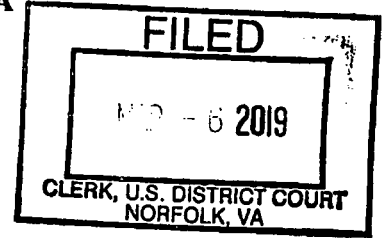
The Clerk is **DIRECTED** to forward a copy of this Report and Recommendation to *pro se* Petitioner and counsel of record for Respondent.

/s/
Lawrence R. Leonard
United States Magistrate Judge 
Lawrence R. Leonard
United States Magistrate Judge

Norfolk, Virginia
January 31, 2019

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Lawrence R. Leonard
United States Magistrate Judge

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**



ELMUZI ABDU,

Petitioner,

v.

ACTION NO. 2:18cv592

HAROLD W. CLARKE,
Director Virginia Department of Corrections,

Respondent.

FINAL ORDER

Petitioner, a Virginia inmate proceeding *pro se*, has submitted a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. ECF No. 1. Giving the Petitioner the benefit of liberal construction, the Petition alleges a violation of his Fourteenth Amendment right to due process resulting from an alleged improper calculation of his good conduct time for 439 days he served in the Fairfax County Adult Detention Center between June 4, 2000, and August 17, 2001. *Id.* at 3, 5; ECF No. 9, attach. 1 at 34.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The Report and Recommendation filed January 31, 2019, recommends dismissal of the petition as barred by the federal statute of limitations. ECF No. 18. Each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. *Id.* at 7. On February 13, 2019, the Court received Petitioner's objections to the Report and Recommendation. ECF No. 19.

In the objections, Petitioner raises several new arguments related to timeliness. First, Petitioner argues the period of time from January 28, 2016—the date the United States Magistrate Judge determined the AEDPA statute of limitations began to run¹—to the date Petitioner filed his state habeas petition was only 63 days, he filed his state habeas petition timely, and argues that limitations period should have been statutorily tolled after that filing. ECF No. 19 at 4, 7; *see also* ECF No. 18 at 6 (Giving Petitioner the benefit of January 28, 2016, a date on which Petitioner actually knew of the alleged good time credit miscalculation because he received a letter from VDOC on that date in response to an inquiry about the same). Second, Petitioner argues that, even if the Court were to add up the intermittent periods between January 28, 2016,² and October 30, 2017,³ during which no court was actively considering his habeas action, that period would only be a collective 346 days, which is less than one year under AEDPA’s limitations period. ECF No. 19 at 7-8. Third, Petitioner alleges the federal statute of limitations should have been equitably tolled. *Id.* at 7-9. Petitioner did not make these arguments in his Petition or raise them in response to Respondent’s Motion to Dismiss. *See generally*, ECF Nos. 1, 15.

Regarding Petitioner’s first and second arguments, Petitioner appears to assert in both instances that he is entitled to statutory tolling of the AEDPA limitations period. Petitioner is correct that the AEDPA statute of limitation does not continue to run for “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). However, as the Report and Recommendation aptly notes, Petitioner’s state habeas petition is a different *claim* from that which Petitioner asserted in his federal Petition. *See* ECF No. 18 at 6-7. Petitioner’s state habeas

¹ Petitioner states in his objection that he became aware of the alleged miscalculation at his annual review hearing, a date prior to January 28, 2019. ECF No. 19 at 7. However, Petitioner does not state what day his annual review hearing occurred and seems to accept the date identified by the Report and Recommendation of January 28, 2016

² The date the statute of limitations began to run.

³ The date Petitioner filed his federal habeas petition.

petition alleged a violation of the Virginia Code and the instant Petition alleges a violation of Petitioner's Fourteenth Amendment due process rights. *See id.* Thus, because Petitioner's claims are different, Petitioner's state habeas petition was not "with respect to the pertinent judgment or claim [that] is pending." 28 U.S.C. § 2244(d)(2). Therefore, Petitioner's state habeas petition did not toll the limitations period, giving Petitioner until January 28, 2017,⁴ to file a federal habeas petition under AEDPA. Because Petitioner did not file his Petition until October 30, 2017, his Petition was untimely by 275 days.

Regarding Petitioner's third argument, Petitioner again is correct that equitable tolling may be available to save an untimely federal petition if a petitioner can demonstrate that "(1) he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000); *see* ECF No. 19 at 6. However, Petitioner is mistaken that equitable tolling is applicable to save his current Petition. As Petitioner's objection to the Report and Recommendation observes, the petitioner "'bears the burden of demonstrating he is entitled to equitable tolling.'" ECF No. 19 at 6 (quoting *Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003) and citing *Yang v. Archuleta*, 525 F.3d 925, 928 (11th Cir. 2008)). In the Fourth Circuit this means "the petitioner is obliged to specify the steps he took in diligently pursuing his federal claim, and a lack of diligence generally acts to negate the application of equitable tolling." *Rashid v. Clarke*, No. 1:18CV262, 2018 WL 1937349, at *3 (E.D. Va. Apr. 24, 2018) (citing *Spencer v. Sutton*, 239 F.3d 626, 630 (4th Cir. 2001)). "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

⁴ One year from the January 28, 2016, the date that the limitations period began to run.

demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the circumstances.” *Id.* (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)). By the filing of his state habeas petition, Petitioner has demonstrated that he has pursued his rights diligently and that no extraordinary circumstance has stood in his way. However, Petitioner has merely failed to diligently pursue *all* of his potentially-available rights—including his due process rights under the Fourteenth Amendment—in his state habeas petition, to the detriment of his instant Petition. Petitioner has put forth no factual support for his failure to assert his Fourteenth Amendment due process claim in his state habeas petition nor has he offered any evidence to support that this failure is entitled to equitable tolling under the two factors set out above. Therefore, Petitioner has not adequately demonstrated he is entitled to equitable tolling of the AEDPA limitations period.

The Court, having reviewed the record and examined the objections filed by Petitioner to the Report and Recommendation, and having made *de novo* findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report and Recommendation. It is, therefore, ORDERED that Respondent’s Motion to Dismiss, ECF No. 10, is GRANTED, and the petition for writ of habeas corpus, ECF No. 1, is DENIED and DISMISSED as barred by the federal statute of limitations. It is further ORDERED that judgment be entered in favor of Respondent.

Petitioner has failed to demonstrate “a substantial showing of the denial of a constitutional right,” therefore, the Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003).

Petitioner is hereby notified that he may appeal from the judgment entered pursuant to this

Final Order by filing a *written* notice of appeal with the Clerk of this court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty days from the date of entry of such judgment.

The Clerk shall mail a copy of this Final Order to Petitioner and counsel of record for Respondent.



Raymond A. Jackson

United States District Judge

Raymond A. Jackson

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
March 6, 2019

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

ELMUIZ ABDU,

Petitioner,

v.

CASE NO. 2:18cv592

HAROLD W. CLARKE,

Respondent.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by the Court.** This action came for decision by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Respondent's Motion to Dismiss is **GRANTED**, and the petition for writ of habeas corpus is **DENIED** and **DISMISSED** as barred by the federal statute of limitations. It is further **ORDERED** that judgment be entered in favor of Respondent.

DATED: March 5, 2019

FERNANDO GALINDO
Clerk of Court

/s/
By _____
Jaime Meyers
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Abdu El Muiz,

Petitioner,

VERSUS

Case #: CL2016 4983

Harold W. Clarke, Director,

Respondent.

ORDER

On this day, the Court has considered the inmate litigant's Petition for Writ of Habeas Corpus, Respondent's Motion to Dismiss and accompanying exhibit, and the authorities cited therein. Pursuant to Code § 8.01-654(B)(4), this Court issues its ruling on the record before it without the need of a hearing.

UPON CONSIDERATION THEREOF, the Court makes the following findings:

1. Petitioner Abdu El Muiz, a/k/a Elmuiz Abdu, #1091055 ("Petitioner") is a Virginia Department of Corrections offender presently incarcerated at Deerfield Correctional Center. He filed a Petition for a Writ of Habeas Corpus disputing whether he has been appropriately credited with jail time credit for 439 days of time spent in Fairfax County Jail and whether he has received the appropriate amount of earned sentence credit.
2. In response to Petitioner's arguments, the Court finds that Petitioner has been appropriately credited with the credits he is owed.
3. The Court therefore finds that all of Petitioner's arguments are without merit and his petition for a writ of habeas corpus should be denied and dismissed.

It is therefore ADJUDGED, ORDERED, and DECREED that the Motion to Dismiss is GRANTED and that the Petition for Writ of Habeas Corpus is DENIED and DISMISSED.

The Clerk is DIRECTED to strike this matter from the Court's active docket.

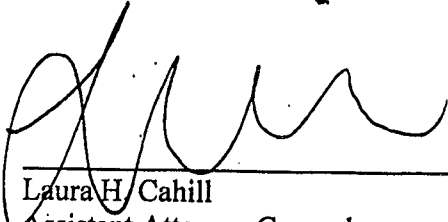
Further endorsement upon this Order is hereby waived per Virginia Supreme Court Rule 1:13.

It is further ORDERED that the Clerk of this Court shall send an attested copy of this Order to the Petitioner and to counsel for VDOC.

ENTER: 5/24/16

Judge *Gene B. Carr*

I ASK FOR THIS:



Laura H. Cahill
Assistant Attorney General
Office of the Attorney General
Criminal Justice & Public Safety Division
900 East Main Street
Richmond, Virginia 23219
Phone: (804) 786-5630
Fax: (804) 786-4239
VSB # 86328

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Thursday the 23rd day of March, 2017.*

Abdu El Muiz,

against Record No. 161104
 Circuit Court No. CL2016-4983

Harold W. Clarke, Director
Virginia Department of Corrections,

FILED ✓
CRIMINAL
2017 APR 17 AM 8:54
JOHN L. FREY
CLERK-CIRCUIT COURT
FAIRFAX, VA
Appellant,

Appellee.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

By:

Patricia L. Harrington, Clerk

Deputy Clerk

NOV 08 2018

JULIA C. DUDLEY, CLERK
BY: *H. McDonnell*
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ELMUIZ ABDU,

Petitioner,

v.

HAROLD W. CLARKE,

Respondent.

Case No. 7:17cv00496

ORDER

By: Hon. Jackson L. Kiser
Senior United States District Judge

Elmuiz Abdu, a Virginia inmate proceeding pro se, filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging the calculation of his earned sentence credit. Respondent filed a motion to dismiss, and the petitioner responded, making the matter ripe for disposition. However, after review of the record, I find that proper venue lies in the Eastern District of Virginia where the petitioner was convicted and where he is currently incarcerated. As such, I will transfer the action to the Eastern District of Virginia.

I.

Under 28 U.S.C. § 2241(d), a petition for a writ of habeas corpus may be filed in the United States District Court of either the judicial district in which the petitioner is presently confined or the judicial district in which he was convicted and sentenced. See also Braden v. 30th Jud. Cir. Ct., 410 U.S. 484, 497 (1973); Wadkins v. City & Cty. of Tulare, No. 18cv0886-MMA, 2018 U.S. Dist. LEXIS 78572, at *1-2 (S.D. Cal. May 9, 2018). Abdu was convicted and sentenced in Fairfax County. He was confined from June 4, 2000 to August 17, 2001 in the Fairfax County Adult Detention Center. When he filed this petition, he was confined in the Deerfield Correctional Center. Southampton County, where Deerfield Correctional Center is located, and Fairfax County are both in the Eastern District of Virginia's jurisdiction. See 28

U.S.C. § 127. As Abdu was neither convicted nor confined in the Western District of Virginia, jurisdiction exists solely in the Eastern District of Virginia.

Therefore, I will, in the furtherance of justice, transfer this matter to the United States District Court for the Eastern District of Virginia. See 28 U.S.C. § 2241(d); Wadkins, 2018 U.S. Dist. LEXIS 78572, at *2 (discussing a district court's lack of jurisdiction for a similarly situated § 2254 petition and the ability to transfer the case to the correct district).

II.

For the foregoing reasons, it is **ORDERED** that this action is **TRANSFERRED** to the United States District Court for the Eastern District of Virginia. The Clerk is directed to transfer all pleadings filed in this case, a copy of the docket sheet, and the state court files to the Clerk of the United States District Court for the Eastern District of Virginia. The parties are **ADVISED** to send all future pleadings relevant to this case to the Clerk's Office for the United States District Court for the Eastern District of Virginia.

The Clerk shall send a certified copy of this order to the parties

ENTERED this 8th day of November, 2018.



SENIOR UNITED STATES DISTRICT JUDGE

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