IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-40633

JAMES EARVIN SANDERS,

Petitioner–Appellant,

v.

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

Respondent–Appellee.

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

O R D E R:

James Earvin Sanders, Texas prisoner # 1579328, moves for a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application challenging his conviction and sentence for two counts of aggravated robbery. The district court determined that the § 2254 application was time barred and that Sanders was not entitled to tolling of the limitations period. Sanders argues that the limitations period commenced either (1) the date on which an impediment to filing created by state action was removed, or (2) the date on which the facts supporting the claim could have been discovered through due diligence. He also argues for equitable tolling.

To obtain a COA, Sanders must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court

denies relief based on procedural grounds, the applicant satisfies this standard by showing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Sanders has not made the requisite showing.

Accordingly, IT IS ORDERED that Sanders's motion for a COA is DENIED. His motion to proceed in forma pauperis on appeal is also DENIED.

Don R. Willett

DON R. WILLETT
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JAMES EARVIN SANDERS, #1579328	§	
	§	
VS.	§	CIVIL ACTION NO. 4:19cv236
	§	
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

Petitioner James Earvin Sanders, an inmate confined in the Texas prison system, proceeding *pro se*, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The cause of action was referred to United States Magistrate Judge Kimberly C. Priest Johnson, who issued a Report and Recommendation (Dkt. #8) concluding that the petition should be dismissed as time-barred. Sanders has filed objections (Dkt. #10).

Sanders is challenging his Denton County conviction for two counts of aggravated robbery. On February 1, 2008, after a jury trial, he was sentenced to life imprisonment with the sentence to run consecutively to a federal sentence. On appeal, the Second Court of Appeals modified the cumulation order and otherwise affirmed the conviction. *Sanders v. State*, No. 02-08-058-CR, 2008 WL 4445644 (Tex. App. - Fort Worth Oct. 2, 2008, no pet.). The conviction became final thirty days later on November 1, 2008. The present petition was due one year later on November 1, 2009, in the absence of tolling provisions. It was not filed until more than nine (9) years later on February 14, 2019. Sanders did not file an application for a writ of habeas corpus in state court until March 22, 2017. By then, the present petition was already time-barred by over seven years; thus, the pendency of the state application did not effectively toll the deadline of November 1, 2009. The Magistrate Judge accordingly concluded that the present petition is time-barred.

In his objections, Sanders argues that the applicable limitations provision should be 28 U.S.C. § 2244(d)(1)(D), which states that the limitations period shall run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." He asserts that he did not receive the documents necessary to pursue a challenge to his conviction until after September 15, 2011. Assuming *arguendo* that date should be used, the present petition was still due on September 15, 2012. The petition was not filed until February 14, 2019. The petition is time-barred.

Sanders goes on to claim that the State forced him to give up the documents within one year of receiving them. He thus argues that the State created an impediment to filing thereby triggering § 2244(d)(1)(B), which states that the limitations period shall run from "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." He explains that he had to give up his documents when he was transferred from federal to state custody. The Court finds that property problems associated with him being transferred is not an impediment created by State action in violation of the Constitution or laws of the United States. Moreover, Sanders could still have filed an application without attaching the documentation. He has not shown that § 2244(d)(1)(B) is applicable.

The Report of the Magistrate Judge, which contains her proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by Sanders to the Report, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and Sander's objections are without merit. Therefore, the Court hereby adopts the findings and conclusions of the Magistrate

Judge as the findings and conclusions of the Court. The Court is of the opinion, and so finds, that the present petition is time-barred.

Accordingly, it is **ORDERED** that the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice as time-barred. A certificate of appealability is **DENIED**. All motions not previously ruled on are hereby **DENIED**.

SIGNED this 1st day of July, 2019.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JAMES EARVIN SANDERS, #1579328	§	
	§	
VS.	§	CIVIL ACTION NO. 4:19cv236
	§	
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner James Earvin Sanders, an inmate confined in the Texas prison system, proceeding *pro se*, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

Facts of the Case

Sanders is challenging his Denton County conviction for two counts of aggravated robbery. On February 1, 2008, after a jury trial, he was sentenced to life imprisonment. On appeal, the Second Court of Appeals modified the cumulation order and otherwise affirmed the conviction. *Sanders v. State*, No. 02-08-058-CR, 2008 WL 4445644 (Tex. App. - Fort Worth Oct. 2, 2008, no pet.).

Sanders states that he filed an application for a writ of habeas corpus in state court on March 22, 2017. The Texas Court of Criminal Appeals denied his application without written order on November 14, 2018.

The present petition was filed on March 27, 2019. Sanders states that he placed the petition in the prison mail system on February 14, 2019. The petition is deemed filed on February 14, 2019, in accordance with the "mailbox rule." *See Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998). The petition contains eight grounds for relief.

On May 8, 2019, an order was issued giving Sanders the opportunity to explain why the petition should not be dismissed as time-barred. *See Day v. McDonough*, 547 U.S. 198, 210 (2006). Sanders filed a response (Dkt. #7) on June 3, 2019.

Appendix C

Statute of Limitations

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") was signed into law. The law made several changes to the federal habeas corpus statutes, including the addition of a one year statute of limitations. 28 U.S.C. § 2244(d)(1). The AEPDA provides that the one year limitations period shall run from the latest of four possible situations. Section 2244(d)(1)(A) specifies that the limitations period shall run from the date a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review. Section 2244(d)(1)(B) specifies that the limitations period shall run from the date an impediment to filing created by the State is removed. Section 2244(d)(1)(C) specifies that the limitations period shall run from the date in which a constitutional right has been initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review. Section 2244(d)(1)(D) states that the limitations period shall run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Section 2244(d)(2) also provides that 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.

Discussion and Analysis

In the present case, Sanders is challenging his conviction. The appropriate limitations provision is § 2244(d)(1)(A), which states that the statute of limitations started running when the conviction became final. Sanders did not file a petition for discretionary review, thus the conviction became final when the opportunity to file a petition for discretionary review expired. He had thirty days after the court of appeals issued a decision to file a petition for discretionary review. Tex. R. App. Proc. 68.2(a); *Windland v. Quarterman*, 578 F.3d 314, 315 (5th Cir. 2009). The Second Court of Appeals affirmed his conviction on October 2, 2008. The conviction became final thirty days later on November 1, 2008. The present petition was due no later than November 1, 2009, in the absence of tolling provisions. It was not filed until more than nine (9) years later on February 14, 2019.

The provisions of 28 U.S.C. § 2244(d)(2) provide that the time during which a properly filed application for state post-conviction or other collateral review is pending shall not be counted toward any period of limitation. Sanders states that filed an application for a writ of habeas corpus in state court on March 22, 2017. By then, the present petition was time-barred by over seven years. The pendency of the state application did not effectively toll the deadline of November 1, 2009.

Sanders argues that he does not believe that his petition should be dismissed as time-barred because of problems with records and discovery. The type of argument that he is making is an argument for equitable tolling. The Supreme Court held that the AEDPA's statute of limitations may be tolled for equitable reasons. *Holland v. Florida*, 560 U.S. 631, 645 (2010). 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 circumstances stood in his way and prevented timely filing. *Id.* at 649. Sanders has shown neither.

In his response to the order giving him the opportunity to respond to the issue of whether the petition should be dismissed as time-barred, Sanders also mentions 28 U.S.C. § 2244(d)(1)(B). He states that the limitations period should not have started running until he received his documents in September 2016. Sanders acknowledges that he sent the documents home. He did not receive his documents again until September 2016. The facts discussed by him do not show an impediment created by the State. Section 2244(d)(1)(B) is not applicable.

Overall, the present petition was filed more than nine (9) years too late. The petition should be dismissed as time-barred.

Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 480 U.S. ___, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice or judge. *Id.* Although Sanders has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability

because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner need only show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

In this case, reasonable jurists could not debate the denial of Sanders' § 2254 petition on procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. Accordingly, it is respectfully recommended that the Court find that Sanders is not entitled to a certificate of appealability as to his claims.

Recommendation

It is accordingly recommended that the above-styled petition for a writ of habeas corpus be denied and the case be dismissed with prejudice as time-barred. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or

recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 6th day of June, 2019.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE