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## **Elkins v. Shoop, 2020 U.S. App. LEXIS 38043**

**Copy Citation**

United States Court of Appeals for the Sixth Circuit

December 4, 2020, Filed

No. 20-3933

**Reporter**

**2020 U.S. App. LEXIS 38043 \***

SHEAN ELKINS, Petitioner-Appellant, v. TIM SHOOP, Warden, Respondent-Appellee.

**Prior History:** Elkins v. Warden, Chillicothe Corr. Inst., 2020 U.S. Dist. LEXIS 144653 (S.D. Ohio, Aug. 12, 2020)

### **Core Terms**

habeas corpus petition, direct appeal, jurists, statute of limitations, district court, certificate, time-barred, Appeals, collateral review, out-of-time, one-year, delayed, toll, denial of constitutional rights, extraordinary circumstances, expiration of time, equitable tolling, in forma pauperis, right to file, timely filing, state court, circumstances, convicted, innocence, diligent, corpus, prison, rights, cases

**Counsel:** [\*1] Shean Elkins, Petitioner - Appellant, Pro se, Chillicothe, OH.

**Judges:** Before: SILER, Circuit Judge.

**Opinion by:** SILER



Opinion  
Document: Elkins v. Shoop, 2020 U.S. App. L...

ORDER

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Shean Elkins, an Ohio prisoner proceeding pro se, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The court construes the notice of appeal as a request for a certificate of appealability. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(2). Elkins requests leave to proceed in forma pauperis.

In 2013, Elkins pleaded guilty to four counts of rape. He was sentenced to serve a total of twenty-two years in prison and found to be a sexual predator. The Ohio Court of Appeals affirmed the trial court's judgment. State v. S.E., No. 13AP-325, 2014-Ohio-413, 2014 WL 504772 (Ohio Ct. App. Feb. 6, 2014). Elkins did not appeal to the Ohio Supreme Court.

Elkins stated that he filed a motion for a delayed direct appeal on April 9, 2019. The Ohio Court of Appeals denied the motion on February 18, 2020. Elkins stated that the Ohio Supreme Court declined to accept jurisdiction of his appeal on May 12, 2020.

Elkins mailed this habeas corpus petition from prison on June 1, 2020, and it is considered filed on that date. See Houston v. Lack, 487 U.S. 266, 276, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988); Cook v. Stegall, 295 F.3d 517, 521 (6th Cir. 2002). Elkins's petition alleged three grounds for relief. On the recommendation of a magistrate judge and over Elkins's objections, **[\*2]** the district court dismissed Elkins's habeas corpus petition as time-barred and denied a certificate of appealability.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a habeas corpus petition is denied on procedural grounds, the petitioner must show "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, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

Reasonable jurists would not debate the district court's determination that Elkins's habeas corpus petition was time-barred. A federal habeas corpus petition is subject to a one-year statute of limitations that begins to run from the latest of four possible circumstances. 28 U.S.C. § 2244(d)(1)(A)-(D). Here, the statute of limitations began to run from "the date on which the [state court] 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).



Document: ~~Elkins v. Shoop, 2020 U.S. App. LEXIS 38043~~ None of the other three circumstances apply in this case. See 28 U.S.C. § 2244 .

~~(d)(1)(B)-(D) the limitations period is tolled while "a properly filed application~~ **[\*3]** ~~for State post-conviction or other collateral review with respect to the~~ **[\*3]** ~~judgment or claim is pending."~~ 28 U.S.C. § 2244(d)(2)

The Ohio Court of Appeals ~~1001~~ **[\*3]** issued its opinion in Elkins's direct appeal on February 6, 2014. Elkins then had forty-five days to appeal to the Ohio Supreme Court. See Ohio Sup. Ct. Prac. R. 7.01(A)(1)(a)(i). Because he did not do so, his convictions became final on Monday, March 24, 2014. See Fed. R. Civ. P. 6(a)(1)(C). Thus, absent tolling, Elkins had one year from March 24, 2014, to file his § 2254 habeas corpus petition. Elkins's habeas corpus petition, filed on June 1, 2020, was not filed within that one-year period. Although Elkins filed a motion for a delayed direct appeal, that motion did not toll the statute of limitations because it was filed after the statute of limitations had expired. See Vroman v. Brigano, 346 F.3d 598, 602 (6th Cir. 2003).

The district court rejected Elkins's contention that, under the reasoning of Jimenez v. Quarterman, 555 U.S. 113, 121, 129 S. Ct. 681, 172 L. Ed. 2d 475 (2009), the statute of limitations was restarted during the pendency of his motion for a delayed direct appeal. *Jimenez* held that "where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet 'final' for purposes of § 2244(d)(1)(A)." 555 U.S. at 121. **[\*4]** In such cases, the judgment of conviction does not become final until "the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal." *Id.* Because Elkins was not granted the right to file an out-of-time direct appeal during collateral review proceedings, reasonable jurists would not debate the district court's determination that *Jimenez* does not apply to Elkins's case. Thus, Elkins's habeas corpus petition is time-barred under § 2244(d)(1)(A).

The one-year statute of limitations set forth in § 2244(d) "is subject to equitable tolling in appropriate cases." Holland v. Florida, 560 U.S. 631, 645, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (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 circumstance stood in his way' and prevented timely filing." *Id. at 649* (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)). Reasonable jurists would not disagree with the district court's determination that Elkins failed to show a diligent pursuit of his rights and an extraordinary circumstance preventing the timely filing of his habeas corpus petition.

In addition, reasonable jurists would agree that Elkins did not make a credible showing of actual innocence that would allow his habeas corpus petition **[\*5]** to proceed despite its untimeliness. See Schlup v. Delo, 513 U.S. 298, 327,



Document: 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Elkins presented no new, reliable evidence demonstrating his innocence of the crimes for which he was convicted.

Reasonable jurists would not debate "whether the district court was correct in its procedural ruling" dismissing Elkins's habeas corpus petition as time-barred. See *Slack*, 529 U.S. at 484. Accordingly, the application for a certificate of appealability is **DENIED**, and the motions to proceed in forma pauperis are **DENIED** as moot.



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**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**SHEAN ELKINS,**

**Petitioner,**

**v.**

**CASE NO. 2:20-CV-2934  
JUDGE JAMES L. GRAHAM  
Magistrate Judge Kimberly A. Jolson**

**WARDEN, CHILLICOTHE  
CORRECTIONAL INSTITUTION,**

**Respondent.**

**OPINION AND ORDER**

On August 3, 2020, the Magistrate Judge issued a Report and Recommendation pursuant to Rule 4 of the Rules Governing Section 2254 Cases recommending that this action be dismissed as barred by the one-year statute of limitations under 28 U.S.C. § 2244(d). (Doc. 5.) Petitioner has filed an Objection to the Magistrate Judge's Report and Recommendation. (Doc. 8.) Pursuant to 28 U.S.C. § 636(b), this Court has conducted a de novo review. For the reasons that follow, Petitioner's Objection (Doc. 8) is **OVERRULED**. The Report and Recommendation (Doc. 5) is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

The Court **DECLINES** to issue a certificate of appealability.

Petitioner challenges his March 20, 2013, convictions pursuant to his guilty plea in the Franklin County Court of Common Pleas on four counts of rape. The trial court imposed the jointly recommended sentence of 22 years' incarceration and adjudicated Petitioner as a sexual predator. *See State v. S.E.*, 10th Dist. No. 13AP-325, 2014 WL 504772 (Ohio Ct. App. Feb. 6, 2014). On February 6, 2014, the appellate court affirmed the trial court's judgment. *Id.* Petitioner did not pursue an appeal to the Ohio Supreme Court. On April 9, 2019, he filed a

motion for a delayed appeal. On February 18, 2020, the appellate court denied the motion for a delayed appeal as unavailable, because Petitioner had already perfected his direct appeal as of right. (*Memorandum Decision*, Doc. 8). Petitioner states that, on May 12, 2020, the Ohio Supreme Court declined to accept jurisdiction of the appeal. Referring to *Jimenez v. Quarterman*, 555 U.S. 113 (2009), Petitioner now argues that the one-year statute of limitations did not begin to run until the following day. (*Objection*, Doc. 8, PAGEID # 91.) He objects to the recommendation of dismissal of this action as time-barred.

The Supreme Court's decision in *Jimenez* does not assist the Petitioner. In *Jimenez*, the Supreme Court held:

[W]here a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet "final" for purposes of 2244(d)(1)(A). In such a case, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" must reflect the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal.

*Id.* at 121. These are not the circumstances here. Petitioner perfected a timely appeal. The state appellate court rejected his 2019 motion for a delayed appeal, filed long after the statute of limitations had already expired, as improper, as Petitioner has already had his first appeal as of right. As discussed by the Magistrate Judge, the statute of limitations expired on March 24, 2015. Petitioner waited more than five years and two months, until June 1, 2020, to execute this habeas corpus petition. Plainly, it is untimely. Moreover, the record does not indicate that Petitioner acted diligently in pursuing relief or that some extraordinary circumstance prevented his timely filing so as to warrant application of equitable tolling of the statute of limitations. *See Holland v. Florida*, 560 U.S. 631, 649 (2010).

For the foregoing reasons and for the reasons detailed in the Magistrate Judge's Report and Recommendation, Petitioner's Objection (Doc. 8) is **OVERRULED**. The Report and Recommendation (Doc. 5) is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court now considers whether to issue a certificate of appealability. "In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court." *Jordan v. Fisher*, —U.S. —, 135 S.Ct. 2647, 2650 (2015); 28 U.S.C. § 2253(c)(1) (requiring a habeas petitioner to obtain a certificate of appealability in order to appeal).

When a claim has been denied on the merits, a certificate of appealability may issue only if the 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 of the denial of a constitutional right, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)). When a claim has been denied on procedural grounds, a certificate of appealability may issue if the petitioner establishes 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. *Id.*

The Court is not persuaded that reasonable jurists would debate the dismissal of this action as time-barred. The Court therefore **DECLINES** to issue a certificate of appealability.

The Court certifies that the appeal would not be in good faith and that an application to proceed *in forma pauperis* on appeal should be **DENIED**.

**IT IS SO ORDERED.**

Date: August 12, 2020

s/James L. Graham  
**JAMES L. GRAHAM**  
**UNITED STATES DISTRICT JUDGE**

UNITED STATES DISTRICT COURT  
for the  
Southern District of Ohio

Shean Elkins,  
Plaintiff  
v.  
Warden, Chillicothe  
Correctional Institution,  
Defendant

)  
)  
)  
)  
)  
Civil Action No. 2:20-CV-2934

The court has ordered that (*check one*):

the plaintiff (*name*)  
defendant (*name*) recover from the  
interest at the rate of %, plus post judgment interest at the rate of dollars (\$ ), which includes prejudgment  
%, per annum, along with costs.

the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (*name*) recover costs from the plaintiff (*name*)

other:

This case is dismissed.

This action was (*check one*):

tried by a jury with Judge presiding, and the jury has  
rendered a verdict.

tried by Judge without a jury and the above decision  
was reached.

decided by Judge on a motion for

Date: Aug 12, 2020

CLERK OF COURT

Denise M. Shane

*Signature of Clerk or Deputy Clerk*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**SHEAN ELKINS,**

**Petitioner,**

**v.**

**CASE NO. 2:20-CV-2934  
JUDGE JAMES L. GRAHAM  
Magistrate Judge Kimberly A. Jolson**

**WARDEN, CHILLICOTHE  
CORRECTIONAL INSTITUTION,**

**Respondent.**

**REPORT AND RECOMMENDATION**

Petitioner, a state prisoner, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This case has been referred to the Undersigned pursuant to 28 U.S.C. § 636(b) and Columbus' General Order 14-1 regarding assignments and references to United States Magistrate Judges.

This matter is before the Court on its own motion under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Rule 4"). Pursuant to Rule 4, the Court conducts a preliminary review to determine whether "it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief . . ." If it does so appear, the petition must be dismissed. *Id.* With this standard in mind, and for the reasons that follow, these are the circumstances here. It is therefore **RECOMMENDED** that this action be **DISMISSED**.

**I. BACKGROUND**

Petitioner challenges his March 20, 2013 convictions pursuant to his guilty plea in the Franklin County Court of Common Pleas on four counts of rape. The trial court imposed the jointly recommended sentence of 22 years incarceration and adjudicated Petitioner as a sexual predator. *See State v. S.E.*, 10th Dist. No. 13AP-325, 2014 WL 504772 (Ohio Ct. App. Feb. 6,

2014). Petitioner timely appealed, asserting as his sole assignment of error that the trial court erred in adjudicating him as a sexual predator. On February 6, 2014, the appellate court affirmed the trial court's judgment. *Id.* Petitioner did not pursue an appeal to the Ohio Supreme Court. On April 9, 2019, he filed a motion for a delayed appeal, asserting the denial of the effective assistance of counsel and that the prosecutor violated *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner does not indicate the status of those proceedings.

On June 1, 2020, Petitioner executed this habeas corpus petition. (Doc. 1, PAGEID # 15). He asserts that he was denied the effective assistance of counsel and that the prosecutor violated *Brady*. However, the record reflects that the statute of limitations bars review of Petitioner's claims.

## **II. STATUTE OF LIMITATIONS**

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became effective on April 24, 1996, imposes a one-year statute of limitations on the filing of habeas corpus petitions. 28 U.S.C. § 2244(d). The statute provides:

(d)(1) A 1-year period of limitation shall apply to an 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 the 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 and 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 postconviction 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.

*Id.*

A District Court is permitted, but not obligated, to *sua sponte* address the timeliness of a federal habeas corpus petition, *Day v. McDonough*, 547 U.S. 198 (2006), and may do so when conducting an initial review under Rule 4. *See Wogenstahl v. Charlotte*, No. 1:17-cv-298, 2017 WL 3053645, at \*2 (S.D. Ohio July 19, 2017) (citing *McDonough*, 547 U.S. at 198).

Applied here, Petitioner’s judgment of conviction became final under the provision of § 2244(d)(1)(A) on March 23, 2014, forty-five days after the appellate court’s February 6, 2014 dismissal of the appeal, when the time period expired to file a timely appeal with the Ohio Supreme Court. *See Montgomery v. Warden, Allen Corr. Inst.*, No. 2:19-cv-3077, 2019 WL 4737999, at \*3 (S.D. Ohio Sept. 27, 2019) (citing *Searcy v. Carter*, 246 F.3d 515, 517 (6th Cir. 2001); *Taher v. Warden*, No. 1:12-cv-400, 2013 WL 485789, at \*6 (S.D. Ohio Feb. 6, 2013)). The statute of limitations began to run on the following day and expired one year later, on March 24, 2015. Petitioner waited more than five years and two months, until June 1, 2020, to execute this habeas corpus petition. His 2019 motion for a delayed appeal did not affect the running of the statute of limitations as he filed that motion long after the statute of limitations had already expired. “The tolling provision [of § 2244(d)(2)] does not . . . ‘revive’ the limitations period (*i.e.*, restart the clock at zero); it can only serve to pause a clock that has not yet fully run.” *Vroman v. Brigano*, 346 F.3d 598, 601 (6th Cir. 2003) (citing *Rashid v. Khulmann*, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)). Moreover, Petitioner does not allege, and the record does not reflect, any extraordinary circumstances that would justify equitable tolling of the statute of limitations. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (To obtain equitable tolling of the statute of limitations, a

litigant must establish that he has been diligently pursued relief and that some extraordinary circumstance stood in his way of timely filing) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

### **III. RECOMMENDED DISPOSITION**

Therefore, it is **RECOMMENDED** that this action be **DISMISSED**.

#### **Procedure on Objections**

If any party objects to this Report and Recommendation, that party may, within fourteen days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the district judge review the Report and Recommendation de novo, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). The parties are further advised that, if they intend to file an appeal of any adverse decision, they may submit arguments in any objections filed, regarding whether a certificate of appealability should issue.

**IT IS SO ORDERED.**

Date: August 3, 2020

/s/ Kimberly A. Jolson

KIMBERLY A. JOLSON

UNITED STATES MAGISTRATE JUDGE