

United States Court of Appeals
for the Fifth Circuit



No. 19-60401

A True Copy
Certified order issued Sep 08, 2020

DAREX ANTONIO CHESTER,

Yule W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Petitioner—Appellant,

versus

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF
CORRECTIONS,

Respondent—Appellee.

Appeals from the United States District Court
for the Southern District of Mississippi
USDC No. 5:18-CV-36

ORDER:

Darex Antonio Chester, Mississippi prisoner # R2129, moves for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 application as time barred. He asserts that he is entitled to equitable tolling, but while he makes arguments supporting his substantive claims for § 2254 relief, he makes no argument challenging the time bar ruling or the rejection of his assertion of equitable tolling. Accordingly, he has abandoned the time bar issues. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).

Exhibit 5

No. 19-60401

A COA may be issued only if the applicant “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court has denied a request for habeas relief on procedural grounds, the prisoner 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*, 529 U.S. at 484. Because Chester has not made the requisite showing, his motion for a COA is DENIED.

/s/ Catharina Haynes

CATHARINA HAYNES

United States Circuit Judge

United States Court of Appeals

**FIFTH CIRCUIT
OFFICE OF THE CLERK**

**LYLE W. CAYCE
CLERK**

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

October 15, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

W.M. Gett

By: Whitney M. Jett, Deputy Clerk
504-310-7772

Mr. Darex Antonio Chester
Ms. Bridgette Grant
Mr. Arthur S. Johnston III

United States Court of Appeals
for the Fifth Circuit

No. 19-60401

DAREX ANTONIO CHESTER,

Petitioner—Appellant,

versus

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF
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for the Southern District of Mississippi
USDC No. 5:18-CV-36

Before CLEMENT, ELROD, and HAYNES, *Circuit Judges.*

PER CURIAM:

A member of this panel previously denied Appellant's Motion for a Certificate of Appealability. The panel has considered Appellant's Motion for Reconsideration.

IT IS ORDERED that the motion is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DAREX ANTONIO CHESTER

PETITIONER

v.

CAUSE ACTION NO. 5:18-cv-36-DCB-FKB

PELICIA HALL, Commissioner of MDOC

DEFENDANT

FINAL JUDGMENT

This cause having come before the Court on Petitioner Darex Antonio Chester ("Chester")'s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [**Doc. 1**]; on Defendant Commissioner of Mississippi Department of Corrections ("MDOC"), Pelicia Hall, ("Hall")'s Motion to Dismiss [Doc. 6] the petition as untimely pursuant to 28 U.S.C § 2244(d); on United States Magistrate Judge F. Keith Ball's Report and Recommendation [**Doc. 7**]; on Chester's Objection [Doc. 8]; and on Hall's Response in Opposition [Doc. 10];

and the Court, having adopted the Report and Recommendation as the findings and conclusions of this Court in an Order Adopting Report and Recommendation of even date herewith;

and having denied Chester's Motion Under 28 U.S.C. § 2254 and his Objection to the Report and Recommendation;

and having denied Chester a Certificate of Appealability;

Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that the Complaint of Darex Antonio Chester is DISMISSED WITH PREJUDICE.

SO ORDERED this the 29th day of January, 2019.

/s/ David Bramlette
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DAREX ANTONIO CHESTER

PETITIONER

v.

CAUSE ACTION NO. 5:18-cv-36-DCB-FKB

PELICIA HALL, Commissioner of MDOC

DEFENDANT

CERTIFICATE OF APPEALABILITY

A final order adverse to the applicant having been filed in the captioned habeas corpus case, in which the detention complain of arises out of a proceeding pursuant to 28 U.S.C. § 2254, the Court, considering the record in this case and the requirements of 28 U.S.C. § 2253, Rule 22(b) of the Federal Rules of Appellate Procedure, and Rule 11(a) of the Rules Governing Section 2254 and 2254 cases in the United States District Courts, hereby finds that:

A Certificate of Appealability ("COA") should not issue. The applicant has failed to make a substantial showing of a denial of a constitutional right; and, therefore, he is DENIED a COA, sua sponte.

SO ORDERED AND ADJUDGED, this the 29th of January, 2019.

/s/ David Bramlette
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DAREX ANTONIO CHESTER

PETITIONER

VS.

CIVIL ACTION NO. 5:18cv36-DCB-FKB

CLIFTON KAHO, WARDEN

RESPONDENT

REPORT AND RECOMMENDATION

Darex Antonio Chester is a state prisoner who seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed a motion to dismiss the petition as untimely. Chester has filed no response to the motion.

Chester was convicted in the Circuit Court of Pike County, Mississippi, of four counts of unlawful sale of controlled substances. He was sentenced as a habitual offender and a prior drug offender to 60 years each on Counts I and II and 40 years each on Counts III and IV, all sentences to run concurrently, without eligibility of parole or probation. The Mississippi Court of Appeals affirmed Chester's convictions and sentences on May 1, 2014. *Chester v. State*, 201 So. 3d 506 (Miss. Ct. App. 2016). His petitions for rehearing and for certiorari to the Mississippi Supreme Court were denied on October 6, 2016. He filed no petition for writ of certiorari to the United States Supreme Court. On January 4, 2017, Chester filed with the Mississippi Supreme Court an application for leave to seek post-conviction relief. The application was denied on January 25, 2017. Chester's § 2254 petition was filed with this court on or after April 12, 2018.¹

¹ Under the mailbox rule, a prisoner's *pro se* federal habeas petition is deemed filed on the date he delivers the petition to prison officials for mailing to the federal district court. *Coleman v. Johnson*, 184 F.3d 401, 196 F.3d 1259 (5th Cir. 1999). Chester's petition was signed on April 12, 2018, and it was file-stamped by this court on April 18, 2018. Thus, it was filed sometime between these dates.

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year statute of limitation for petitions for writs of habeas corpus under § 2254:

(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 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.

28 U.S.C. § 2244(d). Because Chester did not petition the United States Supreme Court for a writ of certiorari, his judgment became final when his 90-day period for doing so expired, *i.e.*, on January 4, 2017 (90 days after denial of the petition for certiorari to the state supreme court). See *Roberts v. Cockrell*, 319 F.3d 690, 693 (5th Cir. 2003) (“[A] state prisoner’s conviction becomes final for purposes of § 2244 ninety days after the judgment is entered, when the time to file a petition for writ of certiorari with the

Supreme Court has expired.”) Chester had one year from that date, or until January 4, 2018, in which to file for federal habeas relief, subject to tolling under § 2244(d)(2) for any period during which a properly-filed motion for post-conviction relief was pending in the state court. Under § 2244(d)(2), Chester is entitled to 22 days of statutory tolling for the time period during which his state court post-conviction action was pending (January 4, 2017, through January 25, 2017). Thus, his one year expired on January 26, 2018 (one year from January 4, 2017, plus 22 days). Chester has not shown that he is entitled to any further tolling or that any other exception applies. Therefore, his federal petition, filed on or after April 12, 2018, is untimely.

Accordingly, it is recommended that the motion to dismiss be granted and the petition be dismissed with prejudice. The parties are hereby notified that failure to file written objections to the proposed findings, conclusions, and recommendation contained within this report and recommendation within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the proposed factual findings and legal conclusions accepted by the district court. 28 U.S.C. § 636; Fed. R. Civ. P. 72(b); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

Respectfully submitted, this the 10th day of December, 2018.

s/ F. Keith Ball
United States Magistrate Judge

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