

United States Court of Appeals
for the Fifth Circuit

No. 21-20030

United States Court of Appeals
Fifth Circuit

FILED

May 18, 2021

Lyle W. Cayce
Clerk

ROXMAN C. CASTRO,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,*
Correctional Institutions Division,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-4933

ORDER:

Roxman C. Castro, Texas prisoner # 1845477, moves for a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2254 petition as time barred. He also moves for leave to proceed in forma pauperis (IFP). Castro contends that he is entitled to equitable tolling because he did not receive the denial of his state habeas application until after the one-year period for filing his § 2254 petition had run. Castro has abandoned any challenge to the determination that his § 2254 petition was untimely by not raising this argument in his application for a certificate of appealability. *See Blue v. Thaler*, 665 F.3d 647, 662 (5th Cir. 2011).

No. 21-20030

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). To satisfy this standard when the district court has denied a § 2254 petition on procedural grounds, a 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 (2000).

Reasonable jurists would not debate the determination that he was not entitled to equitable tolling. Castro has not made the required showing. Accordingly, his motion for a COA is DENIED and the motion to proceed IFP is DENIED.

/s/ James L. Dennis

JAMES L. DENNIS
United States Circuit Judge

APPENDIX - B

ENTERED

December 02, 2020

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS
David J. Bradley, Clerk

Roxman C. Castro,
Petitioner,

v.

Bobby Lumpkin,
Director, Texas Department
of Criminal Justice, Correctional
Institutions Division,
Respondent.

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Civil Action H-19-4933

Report and Recommendation

Roxman C. Castro has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his conviction for capital murder. (D.E. 1.) The court recommends that the petition be dismissed with prejudice as time-barred.

1. Background

On February 12, 2013, a jury in the 351st District Court of Harris County, Texas, found Roxman C. Castro guilty. (D.E. 8-1 at 211.) The district court sentenced him to life confinement in the Texas Department of Criminal Justice without the possibility of parole. *Id.*

On August 26, 2014, the Court of Appeals for the First District of Texas affirmed the district court's judgment. (D.E. 8-4.) Castro sought additional time to file a petition for discretionary review and the Texas Court of Criminal Appeals granted an out-of-time petition. (D.E. 8-10 at 5–25, 37–40; D.E. 8-11.) Castro filed the petition, which the Texas Court of Criminal Appeals refused on May 3, 2017. (D.E. 8-13, 8-16.) The Supreme Court of the United States denied Castro's petition for writ of certiorari on October 30, 2017. *Castro v. Texas*, 138 S. Ct. 384 (2017) (mem.).

On October 23, 2018, Castro filed a state application for a writ of habeas corpus. (D.E. 1 at 10; D.E. 8-18 at 4–27.) The Texas Court of Criminal Appeals denied the application without written order on November 27, 2019. (D.E. 8-19.) Castro states that he filed his federal petition for writ of habeas corpus on December 6, 2019. (D.E. 1.)

2. Statute of Limitations under 28 U.S.C. § 2244

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) sets a one-year limitations period for federal habeas petitions. *See* 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 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)(1)–(2).

Because Castro challenges a state-court conviction, the limitations period began to run on “the date on which the 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). Castro’s conviction became final on October 30, 2017, when the Supreme Court of the United States denied his petition for writ of certiorari. *United States v. Thomas*, 203 F.3d 350, 356 (5th Cir. 2000). Absent tolling, the limitations period would expire one year later, on October 30, 2018.

Under 28 U.S.C. § 2244(d)(2), the time during which a “properly filed application for State post-conviction or other collateral review” is pending does not count toward the one-year limitations period. “[A] state

habeas petition is 'pending' for the purposes of tolling under § 2244(d)(2) on the day it is filed through (and including) the day it is decided." *Windland v. Quarterman*, 578 F.3d 314, 315 (5th Cir. 2009).

Castro's state habeas application is deemed filed on the date he mailed it. *See Richards v. Thaler*, 710 F.3d 573, 578 (5th Cir. 2013). Because Castro states that he mailed his application on October 23, 2018, the application is deemed filed that day. (D.E. 1 at 10.) The Texas Court of Criminal Appeals denied Castro's state habeas application on November 27, 2019. (D.E. 8-19.) This tolled the limitations period for 400 days, extending the deadline to file a federal habeas petition to December 4, 2018. Castro mailed his federal petition two days late, on December 6, 2018. "AEDPA relies on precise filing deadlines to trigger specific accrual and tolling provisions." *Lookingbill v. Cockrell*, 293 F.3d 256, 265 (5th Cir. 2002) (citing cases that "have denied tolling even where the petition was only a few days late" because of the statute's explicit timelines). Castro's petition is therefore time-barred. No other AEDPA provision applies to extend the limitations period. *See* 28 U.S.C. § 2244(d)(1)(B)–(D).

Castro states that his petition is not time-barred because he was not notified of the state habeas court's decision until December 6, 2019. "Federal courts interpret the federal time period as running from the event described rather than from receipt of notice." *Lookingbill*, 293 F.3d at 262 (collecting cases). The statutory tolling period ended when the Texas Court of Criminal Appeals denied his petition, not when he received notice of the denial.

A petitioner may be entitled to equitable tolling if he can establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Extraordinary circumstances may be found in situations where a petitioner is actively misled about the cause of action or is prevented from asserting his right to file by some extraordinary factor beyond his control. *Felder v. Johnson*, 204 F.3d 168, 174 (5th Cir. 2000). After his conviction became final, Castro waited nearly one year to file his state habeas application. Nothing in the record shows that he was prevented from filing the application earlier. Castro does not explain the delay. *See Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999) (holding that petitioner's circumstances do not warrant equitable tolling when no

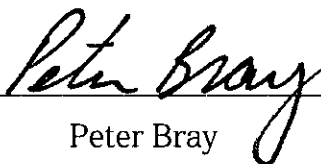
explanation for filing delay is given). Application of equitable tolling is not warranted.

3. Conclusion

The court recommends that Lumpkin's motion for summary judgment be granted and that Castro's petition for writ of habeas corpus be dismissed with prejudice as time-barred.

The parties have fourteen days from service of this report and recommendation to file written objections. See Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(c); Fed. R. Civ. P. 72. Failure to timely file objections will preclude appellate review of factual findings or legal conclusions, except for plain error. See *Thomas v. Arn*, 474 U.S. 140, 147–49 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276–77 (5th Cir. 1988).

Signed at Houston, Texas, on December 2, 2020.

A handwritten signature in black ink, reading "Peter Bray", is written over a horizontal line.

Peter Bray

United States Magistrate Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

United States District Court
Southern District of Texas

ENTERED

January 06, 2021

Nathan Ochsner, Clerk

Roxman C. Castro,
Petitioner,

v.

Bobby Lumpkin,
Director, Texas Department of
Criminal Justice, Correctional
Institutions Division,
Respondent.

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Civil Action H-19-4933

Order of Adoption

On December 2, 2020, Magistrate Judge Peter Bray recommended that the court deny Castro's petition for writ of habeas corpus as time barred. (13) In his objection (14), Castro claims to have placed his federal petition in the prison mail system before the statute of limitations expired on December 4, 2019. In his petition, under penalty of perjury and in answer to a specific question about the date of mailing, Castro stated that he placed his federal petition in the prison mail system on December 6, 2019. (1) Castro does not explain the discrepancy between the statements in his federal petition and the conclusory claim in his objection. Castro's objection is denied. The court adopts the report and recommendation as its memorandum and opinion. The court will issue a separate final judgment.

Signed on January 6, 2021, at Houston, Texas.


Lynn N. Hughes
United States District Judge