APPENDIX A

United States Court of Appeals
for the Ninth Circuit

Memorandum Opinion

Steilman v. Michael, 2021 WL 2419681 (9th Cir. 2021)

Filed June 14, 2021

NOT FOR PUBLICATION

FILED

JUN 14 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DERRICK E. STEILMAN, Petitioner-Appellant, v. REGINALD D. MICHAEL, Director, Montana Department of Corrections; TIMOTHY C. FOX, Montana Attorney General, Respondents-Appellees.	No. 20-35103 D.C. No. CV 19-38-BU-BMM MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, District Judge, Presiding

Submitted June 10, 2021**
Seattle, Washington

Before: GILMAN***, GOULD, and MILLER, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

This case involves Derrick E. Steilman's petition for habeas relief under 28 U.S.C. § 2254. Steilman filed a § 2254 petition challenging the legality of his 110-year-sentence without the possibility of parole for a Montana homicide that he committed when he was 17 years old. The district court dismissed the petition as untimely. We agree with the district court that Steilman's petition was untimely because he failed to seek relief within one year of the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), and because he is not entitled to equitable tolling.

1. Shortly before turning 18, Steilman committed a murder in Butte, Montana. He pleaded guilty in October 1999.

2. Steilman filed an earlier petition for a writ of habeas corpus in the Montana Supreme Court in May 2016, wherein he claimed that his sentence was unconstitutional under the Eighth Amendment because the sentencing judge did not sufficiently account for his youth per the new rule announced in *Miller* and made retroactive in *Montgomery v. Louisiana*, 577 U.S. 190 (2016). The Montana Supreme Court held that "[t]he combination of the good-time credit to which Steilman is eligible and the amount of his sentence that will be discharged while serving a sentence on a wholly unrelated crime" meant that Steilman's sentence was not a de facto life sentence. *Steilman v. Michael*, 407 P.3d 313, 320 (Mont. 2017); *see also Steilman v. Michael*, No. CV 19-38-BU-BMM-KLD, 2019 WL

8017793, at *1 (D. Mont. Nov. 21, 2019), *report and recommendation adopted in part, rejected in part,* No. CV 19-38-BU-BMM, 2020 WL 359212 (D. Mont. Jan. 22, 2020) (noting that the Montana Supreme Court "observed that Steilman's Montana sentence ran concurrently to a Washington state sentence for a separate homicide, which would result in Steilman potentially serving [about] 31 years [for] the Montana homicide.").

3. We need not decide whether the Montana Supreme Court's decision on the merits was contrary to the United States Supreme Court's decision in *Miller* because Steilman's federal habeas corpus petition was untimely. A state petition for habeas corpus that is based upon the recognition of a new right must be filed within one year of "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." 28 U.S.C. § 2244(d)(1)(C). Steilman filed his petition within one year of *Montgomery*, but four years after the decision in *Miller*.

4. Unfortunately for Steilman, the decision that triggers the one-year statute of limitations is *Miller*, not *Montgomery*. *Miller* recognized a new right under the Eighth Amendment (the right to an individualized hearing for juvenile offenders before they can be sentenced to life without parole). 567 U.S. at 480. The Supreme Court's recent decision in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021),

reiterated that *Montgomery* simply held "that *Miller* applied retroactively to cases on collateral review." *Id.* at 1314; *see also id.* at 1316 ("*Montgomery* did not purport to add to *Miller*'s requirements."). Furthermore,

> in making the [*Miller*] rule retroactive, the *Montgomery* Court . . . declined to impose new requirements not already imposed by *Miller.* As *Montgomery* itself explained, the Court granted *certiorari* in that case not to consider whether the rule announced in *Miller* should be expanded, but rather simply to decide whether *Miller*'s "holding is retroactive to juvenile offenders whose convictions and sentences were final when *Miller* was decided."

Id. at 1317 (quoting *Montgomery*, 557 U.S. at 194). This leaves Steilman's timeliness argument based on *Montgomery* meritless because, as the Supreme Court decided in *Dodd v. United States*, 545 U.S. 353, 357 (2005), the date that a right is made retroactive is irrelevant for statute-of-limitations purposes.

5. Moreover, Steilman is not entitled to equitable tolling. His argument turns on an unsubstantiated, vague allegation that "his attorney abandoned him and gave him improper advice as to how much time he had remaining on the statute of limitations." He says that because he was "unable to present his claim to equitable tolling in the district court[,] . . . [t]his Court should . . . reverse and remand this case and give Steilman a chance to establish that he is entitled to equitable tolling."

6. But equitable tolling of the one-year limitations period created by 28 U.S.C. § 2244(d)(1)(C) is rarely granted. *Miranda v. Castro*, 292 F.3d 1063, 1066–67 (9th Cir. 2002). To benefit from equitable tolling, a petitioner must show

that he has "pursu[ed] his rights diligently" and was hindered by an "extraordinary circumstance." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Before the district court, Steilman proffered several reasons for equitable tolling, including attorney malpractice, legal ignorance, and insufficient access to Montana legal materials while incarcerated in the state of Washington. *Steilman*, 2019 WL 8017793, at *3–4.

7. Although Steilman put forth several reasons before the district court in attempting to establish an "extraordinary circumstance," he proffers on appeal only that his attorney misadvised and "abandoned him." But Steilman provides no evidence to substantiate his argument, and this single reason does not constitute an "extraordinary circumstance." *See Frye v. Hickman*, 273 F.3d 1144, 1145–46 (9th Cir. 2001) (holding that counsel's general negligence did not warrant equitable tolling); *see also Ford v. Pliler*, 590 F.3d 782, 786 (9th Cir. 2009) (noting that the petitioner had given the lower court no evidence that an "attorney's conduct had made it impossible . . . to file a timely federal habeas petition"). In any event, the attorney misconduct that Steilman alleges apparently occurred after the statute of limitations had already lapsed, so it could not change the result in this case. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

AFFIRMED.

APPENDIX B

United States District Court, District of Montana

Order Adopted, In Part, and Denied, In Part; and Certificate of Appealability Granted

Steilman v. Michael, 2020 WL 359212 (D.Mont. 2020)

Filed January 22, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

DERRICK E. STEILMAN,

Petitioner,

vs.

REGINALD D. MICHAEL; ATTORNEY GENERAL OF THE STATE OF MONTANA,

Defendant.

CV 19-38-BU-BMM

ORDER

Petitioner Derrick E. Steilman applied for writ of habeas corpus under 28 U.S.C. § 2254 on July 30, 2019. (Doc. 1.) United States Magistrate Judge Kathleen L. DeSoto issued her Findings and Recommendations on November 21, 2019. (Doc. 8.) Judge DeSoto recommends that the Court dismiss Steilman's Petition as time-barred without excuse. (*Id.* at 9.) Judge DeSoto found that Steilman's petition is time-barred because Steilman failed to file his petition for writ of habeas corpus within one year of the Supreme Court's decision *Miller v. Alabama*, 567 U.S. 460 (2012). (*Id.* at 4.) Steilman filed an objection to Judge DeSoto's Findings and Recommendations on December 26, 2019. (Doc. 11.)

The Court reviews de novo those Findings and Recommendations to which a party timely objected. 28 U.S.C. § 636(b)(1). The Court reviews for clear error the portions of the Findings and Recommendations to which the party did not specifically object. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Where a party's objections constitute perfunctory responses argued in an attempt to engage the district court in a reargument of the same arguments set forth in the original response, however, the Court will review the applicable portions of the Findings and Recommendations for clear error. *Rosling v. Kirkegard*, 2014 WL 693315 *3 (D. Mont. Feb. 21, 2014) (internal citations omitted).

Steilman objects to Judge DeSoto's conclusion that the time period for him to file his petition began when the Supreme Court decided *Miller*. (Doc. 11 at 5, 7-9.) Steilman argues that the time period for him to file his petition began on January 25, 2016, when the Supreme Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). (*Id.*) Steilman further objects to Jude DeSoto's conclusion that equitable considerations did not toll the statute of limitations. (*Id.* at 9-14.)

Steilman advances the same arguments he made in his Petition. Judge DeSoto considered those arguments in making her recommendation to the Court. The Court finds no specific objections that do not attempt to relitigate the same

arguments and will review Judge DeSoto's Findings and Recommendations for clear error. *See Rosling*, 2014 WL 693315 at *3. The Court finds no error.

Steilman objects to Judge DeSoto's recommendation to deny Steilman a certificate of appealability. (Doc. 11 at 18-19.) "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2255 Proceedings. A certificate of appealability should issue as to those claims on which the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied if "jurists of reason could disagree with the district court's resolution of [the] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

The Court has found no clear error in Judge DeSoto's findings that Steilman's petition is procedurally barred. The Court will grant a Steilman a certificate of appealability, however, if Steilman chooses to appeal this Court's decision in this Order. Steilman must file a notice of appeal within 60 days and may then move the Ninth Circuit to appoint new counsel to represent him.

Accordingly, **IT IS ORDERED** as follows:

1. Judge DeSoto's Findings and Recommendations (Doc. 8) are **ADOPTED, IN PART,** and **DENIED, IN PART**.

2. Steilman's Petition (Doc. 1) is **DISMISSED WITH PREJUDICE** as time-barred without excuse.

3. The Clerk of Court shall ensure that all pending motions in this case are terminated and shall close the civil file by entering a judgment of dismissal in favor of Respondents and against Petitioner.

4. A certificate of appealability is **GRANTED**. The Clerk of Court shall immediately process the appeal if Steilman files a Notice of Appeal.

DATED this 22nd day of January, 2020.

Brian Morris
United States District Court Judge

APPENDIX C

United States District Court, District of Montana

Finding and Recommendation of United States Magistrate Judge

Steilman v. Michael, 2019 WL 8017793 (D.Mont. 2019)

Filed November 21, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

DERRICK E. STEILMAN, Petitioner, vs. REGINALD D. MICHAEL; ATTORNEY GENERAL OF THE STATE OF MONTANA, Respondents.	Cause No. CV 19-38-BU-BMM-KLD FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This case comes before the Court on state pro se Petitioner Derrick E. Steilman's application for writ of habeas corpus under 28 U.S.C. § 2254.

Steilman was directed to show cause as to why his petition should not be dismissed as time-barred; Steilman timely responded. (Docs. 5 & 6.) For the reasons set forth herein, Steilman's petition is untimely and should be dismissed with prejudice.

I. Background

On October 1, 1999, Steilman pled guilty to deliberate homicide with the use of a weapon in Montana's Second Judicial District, Butte Silverbow County. On October 15, 1999, the district court sentenced Steilman to the Montana State Prison for a 100-year term on the deliberate homicide, with an additional 10-years for use

of a weapon, with the sentences running consecutively. *Steilman v. Michael*, 2017 MT 310, ¶ 8, 389 Mont. 512, 407 P. 3d 313.

On May 31, 2016, represented by pro bono counsel, Colin Stephens, Steilman filed an original petition for writ of habeas corpus in the Montana Supreme Court. Steilman claimed his sentence of 110 years, without the possibility of parole, violated the Eighth Amendment, because he was not afforded individualized sentencing, taking into account the distinct attributes of his youth, in contravention of *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718 (2016).[1]

The Montana Supreme Court determined that while *Miller* and *Montgomery* apply to juvenile offenders in Montana serving life sentences without the possibility of parole, the sentence handed down to Steilman did not qualify as a *de facto* life sentence that would trigger Eighth Amendment protections. *Steilman*, 2017 MT 310, ¶ 23. Because Steilman was eligible for day-to-day credit under Montana's prior sentencing scheme, Steilman would be eligible for release after

[1] On June 25, 2012, in *Miller*, the United States Supreme Court recognized for the first time that sentencing juvenile offenders to life without parole, without consideration of certain factors relating to youth, is cruel and unusual punishment under the Eighth Amendment. *Miller,* 567 U.S. at 465. On January 25, 2016, in *Montgomery*, the Supreme Court found *Miller* was a new substantive rule of constitutional law that is retroactive to cases on state collateral review. *Montgomery*, 136 S. Ct. at 729, 732-36.

serving 55 years, contingent upon his behavior in prison.[2] *Id.* at ¶ 22. Additionally, the Court observed that Steilman's Montana sentence ran concurrently to a Washington state sentence for a separate homicide, which would result in Steilman potentially serving just over 31 years attributable solely to the Montana homicide. *Id.* at ¶¶ 22-23. Steilman's petition was denied.

Steilman timely filed a petition for a writ of certiorari. On May 14, 2018, the United Sates Supreme Court denied Steilman's petition. *Steilman v. Michael*, 138 S. Ct. 1999 (Mem.), 201 L. Ed. 2d 260, 86 USLA 3575.

Steilman filed the instant habeas petition on July 25, 2019. See, (Doc. 1 at 8).[3]

II. Claims

Steilman alleges his Montana state juvenile life sentence of 110 years without the possibility of parole is illegal in light of *Montgomery* and *Miller* and should be considered a *de facto* life sentence. Steilman asks this Court to remand

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[2] Under Mont. Code Ann. § 53-30-105, which was in effect at the time Steilman committed his offense, he was eligible for day-to-day good time credit. This statute was repealed in 1997.

[3] "When a prisoner gives prison authorities a habeas petition or other pleading to mail to court, [pursuant to the mailbox rule,] the court deems the petition constructively 'filed' on the date it is signed[,]" *Roberts v. Marshall*, 627 F. 3d 768, 770 n. 1 (9th Cir. 2010); *Houston v. Lack*, 487 U.S. 266, 276 (1988), which in this case was July 25, 2019.

his case to the state district court for resentencing.

III. Federal Statute of Limitations

Under the Antiterrorism and Effective Death Penalty Act (AEDPA) a state prisoner must file his petition for a writ of habeas corpus within a one-year limitations period. 28 U.S.C. § 2244(d)(1). This limitations period "run[s] from the latest of" several dates, including "(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." *Id.* The Supreme Court clarified that similar language in 28 U.S.C. § 2255 (applicable to federal prisoners) means that the one-year limitation period begins to run when the new right is recognized by the Supreme Court, not when it is made retroactive. See, *Dodd v. United States*, 545 U.S. 353, 357 (2005). Accordingly, the limitations period began to run from the date the Supreme Court decided *Miller*, not from the date *Montgomery* was issued.

The Supreme Court handed down its decision in *Miller* on June 25, 2012; the following day Steilman's one-year time clock began to run. Thus, a federal habeas petition asserting a *Miller* violation must have been filed no later than June 25, 2013. But Steilman did not present any *Miller*-based claim until he filed his petition for a writ of habeas corpus in the Montana Supreme Court May 31, 2016. By this date, the one-year federal limitations period had long since expired.

Moreover, once the federal statute of limitations has run, a newly filed state petition does not reset the clock. *Ferguson v. Palmateer*, 321 F. 3d 820, 823 (9th Cir. 2003)("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed"); see also, *Jiminez v. Rice*, 276 F. 3d 478, 482 (9th Cir. 2001); *Larsen v. Soto*, 742 F. 3d 1083, 1088 (9th Cir. 2013). Because Steilman first raised his *Miller* claim more than one year after the right was initially recognized, his claim is facially untimely under AEDPA.

Equitable Tolling

The statute of limitations "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). A habeas 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 the timely filing of the habeas petition. *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

The standard for equitable tolling of AEDPA's one-year limitations period is a very high bar and is reserved for rare cases. *Miranda v. Castro*, 292 F. 3d 1063, 1066 (9th Cir. 2002) ("Indeed, the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.")(citations omitted). It is the petitioner's burden to establish that equitable tolling is warranted. *Pace*, 544 U.S. at 418; *Rasberry v. Garcia*, 448 F. 3d 1150, 1153 (9th

Cir. 2006). "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). A Petitioner must also establish a "causal connection" between the extraordinary circumstance and his failure to file a timely petition. See, *Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1060 (9th Cir. 2007).

In response to this Court's Order, Steilman asserts he was advised by Stephens that he had one year and 90 days from May 14, 2018, in which to file his federal habeas petition in this Court. (Doc. 6 at 1.) Steilman also states he has been diligently attempting to file his petition, but he is currently incarcerated in Washington state and his lack of legal knowledge and lack of access to Montana law materials has encumbered his efforts. *Id.* at 2-3. Steilman reiterates that he is not making a straight *Miller* claim, rather he is challenging the constitutionality of the Montana Supreme Court's interpretation of *Miller* and *Montgomery* as applied to his sentence. *Id.* at 1, 3. Steilman also asserts he should be appointed counsel due to the complexity of his case. *Id.* at 2-3.

But a prisoner's pro se status, ignorance of the law, or lack of legal representation do not constitute extraordinary circumstances to justify equitable tolling. See e.g., *Rasberry*, 448 F. 3d at 1154; see also, *Ford v. Piler*, 590 F. 3d 782, 789 (9th Cir. 2009)(equitable tolling standard "has never been satisfied by a

prisoner's confusion or ignorance of the law alone.") Likewise, even assuming for the sake of argument that Stephens did provide Steilman with incorrect filing information, such negligence by counsel also does not qualify as an extraordinary circumstance to justify equitable tolling. See, *Miranda*, 292 F. 3d at 1067-68 (attorney miscalculation of filing date is not a circumstance justifying equitable tolling, even though petitioner filed his petition within the time period calculated by the attorney); see also, *Malcolm v. Payne*, 281 F. 3d 951, 962-63 (9th Cir. 2002); *Frye v. Hickman*, 273 F. 3d 1144, 1145-46 (9th Cir. 2001), cert. denied, 535 U.S. 1055 (2002)(counsel's general negligence does not warrant equitable tolling).

Additionally, to the extent that Steilman alleges the Montana Supreme Court misapplied Montana law, the argument is unavailing. The Montana Supreme Court is the final authority on interpretation of state law. A state court's interpretation of state law is binding upon a federal court sitting in habeas corpus. *Bradshaw v. Richey*, 546, US 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Thus, even if Steilman had access to Montana state law materials, this Court could not review the Montana Supreme Court's decision on state law grounds.

Likewise, Steilman's lack of access to certain legal resources constitutes "ordinary prison limitations" and does not rise to the level of an extraordinary circumstance sufficient to warrant equitable tolling, because such conditions are

"hardly extraordinary given the vicissitudes of prison life." *Chaffer v. Prosper*, 592 F. 3d 1046, 1049 (9th Cir. 2010)(quoting *Ramirez v. Yates*, 571 F. 3d 993, 997 (9th Cir. 2009)). But even assuming Steilman had access to unlimited legal resources and/or appointed counsel following the Montana Supreme Court's denial of his state habeas petition, it still would have been impossible for him to meet a federal filing deadline that had already expired.

Steilman has not shown that he is entitled to equitable tolling which would render his petition timely. The petition should be dismissed.

IV. Certificate of Appealability

"The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), Rules governing § 2254 Proceedings. A COA should issue as to those claims on which a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied if "jurists of reason could disagree with the district court's resolution of [the] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

A certificate of appealability should be denied because Steilman has not established an adequate basis to excuse the untimely filing of his petition. There

are no close questions and there is no basis to encourage further proceedings at this time.

Based on the foregoing, the Court enters the following:

RECOMMENDATION

1. Mr. Steilman's Petition (Doc. 1) should be DISMISSED WITH PREJUDICE as time-barred without excuse.

2. The Clerk of Court should be directed to enter a judgment in favor or Respondents and against Petitioner.

3. A certificate of appealability should be DENIED.

Mr. Steilman may object to this Findings and Recommendation within 14 days.[4] 28 U.S.C. § 636(b)(1). Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

DATED this 21st day of November, 2019.

Kathleen L. DeSoto
United States Magistrate Judge

[4] Rule 6(d) of the Federal Rules of Civil Procedure provides that "[w]hen a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail) . . . 3 days are added after the period would otherwise expire under Rule 6(a)." Therefore, since Steilman is being served by mail, he is entitled an additional three (3) days after the period would otherwise expire.