

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13468-H

CHARLES LOUIS,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee,

GEORGIA DEPARTMENT OF CORRECTIONS,

Respondent.

Appeals from the United States District Court
for the Northern District of Georgia

Before: JILL PRYOR and BRASHER, Circuit Judges.

BY THE COURT:

Charles Louis has filed a motion for reconsideration of this Court's March 30, 2021, order denying his motions for a certificate of appealability, leave to proceed *in forma pauperis*, appointment of counsel, and supplementing the record, in order to appeal from the denial of his underlying habeas petition, pursuant to 28 U.S.C. § 2254. Upon review, Louis's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13468-H

CHARLES LOUIS,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee,

GEORGIA DEPARTMENT OF CORRECTIONS,

Respondent.

Appeals from the United States District Court
for the Northern District of Georgia

ORDER:

Charles Louis moves for a certificate of appealability in order to appeal the dismissal of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). His motions for leave to proceed *in forma pauperis*, appointment of counsel, and supplementing the record are DENIED AS MOOT.

/s/ Andrew L. Brasher
UNITED STATES CIRCUIT JUDGE

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 30, 2021

Clerk - Northern District of Georgia
U.S. District Court
18 GREENVILLE ST
NEWNAN, GA 30264

Appeal Number: 20-13468-H
Case Style: Charles Louis v. Warden
District Court Docket No: 3:20-cv-00019-TCB

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13468-H

CHARLES LOUIS,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee,

GEORGIA DEPARTMENT OF CORRECTIONS,

Respondent.

Appeal from the United States District Court
for the Northern District of Georgia

Before: GRANT and LAGOA, Circuit Judges.

BY THE COURT:

This appeal is ALLOWED to PROCEED. To clarify, we lack jurisdiction to review the district court's November 5, 2020 order because it was neither designated in Appellant's notice of appeal nor did it exist at the time the appeal was filed. *See Bogle v. Orange Cty. Bd. of Cty. Comm'rs*, 162 F.3d 653, 661 (11th

Appendix C

Cir. 1998); *McDougald v. Jensen*, 786 F.2d 1465, 1474 (11th Cir. 1986).

Accordingly, this appeal MAY PROCEED only from the district court's August 19, 2020 final judgment and order adopting the magistrate judge's report and recommendation and dismissing the action.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 19, 2021

Charles Louis
Baldwin SP - Inmate Legal Mail
PO BOX 218
HARDWICK, GA 31034-0218

Appeal Number: 20-13468-H
Case Style: Charles Louis v. Warden
District Court Docket No: 3:20-cv-00019-TCB

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

MOT-2 Notice of Court Action

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CHARLES LOUIS,

Petitioner,

v.

RONALD BRAWNER,

Respondent.

CIVIL ACTION FILE

NO. 3:20-cv-19-TCB

ORDER

Petitioner Charles Louis filed the instant 28 U.S.C. § 2254 petition for a writ of habeas corpus challenging his convictions in the Fayette County Superior Court. Respondent Ronald Brawner filed a motion to dismiss the petition as untimely pursuant to 28 U.S.C. § 2244(d), and the magistrate judge issued his report and recommendation ("R&R") recommending that the motion be granted. After it appeared that Louis had failed to file objections, this Court adopted the R&R, granted Brawner's motion, and dismissed the case.

Appendix D

A few days later, the Clerk received Louis's objections [34] and under the prison mailbox rule, the objections were arguably timely filed. Accordingly, this Court will re-evaluate the R&R in light of Louis's objections.

A district judge has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the R&R that is the subject of a proper objection on a de novo basis and any non-objected portion under a "clearly erroneous" standard. "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988).

In the R&R, the magistrate judge noted that, after his convictions for child molestation, aggravated child molestation, aggravated sexual battery, and enticing a child for indecent purposes, the Georgia Court of Appeals affirmed the judgment on April 17, 2007. Louis did not pursue

further direct review. On April 12, 2011, Louis filed a petition for a writ of habeas corpus in state court. That petition was denied on December 21, 2015, and the Georgia Supreme Court dismissed Louis's application for a certificate of probable cause to appeal the denial of habeas corpus relief on January 7, 2019 because Louis failed to file a notice of appeal. Louis filed this action, at the earliest, on December 22, 2019.

Pursuant to 28 U.S.C. § 2244(d)(1), a petitioner pursuing relief under § 2254 must file his petition in federal court within one year of the date that his conviction became final by the conclusion of direct review. As discussed by the magistrate judge, Louis's conviction became final on May 7, 2007, when the ten-day period for him to seek certiorari review in the Georgia Supreme Court expired. Louis thus had until May 7, 2008 to file his petition. Accordingly, the instant petition was filed over ten years too late.

Louis's sixteen pages of objections are difficult to decipher as they contain lengthy passages that discuss matters that are irrelevant to the question of whether he timely filed his petition. As best this Court can determine, he raises two arguments that could be considered assertions

of an entitlement to equitable tolling of the statute of limitations. First, he repeats his argument that he hired an attorney on February 8, 2008, to file his state habeas corpus petition, but that attorney did not file the petition until April 12, 2011. However, as the magistrate judge points out, even if he were entitled to equitable tolling for the period from February 8, 2008, to April 12, 2011 (along with the period when his state habeas corpus action was pending) his § 2254 petition was still filed approximately 261 days too late.

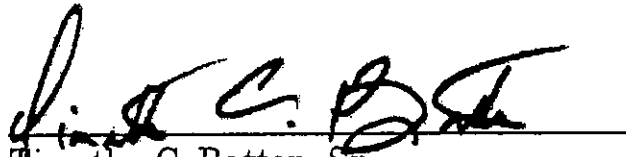
Louis next argues that the Georgia Supreme Court erred in dismissing his application for certificate of probable cause to appeal the denial of habeas corpus relief because he either properly filed a notice of appeal or filed a motion to file an out-of-time notice of appeal, and the state court never ruled on it. However, whether he properly filed a notice of appeal or was entitled to relief with respect to his motion are questions of state law. As the Supreme Court has repeatedly held, “a state court’s interpretation of state law . . . binds a federal court sitting in habeas corpus,” *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). This

Court is thus bound by the Georgia Supreme Court's dismissal of Louis's application for certificate of probable cause.

Having re-evaluated the R&R in light of Louis's objections, this Court concludes that the magistrate judge is correct. Accordingly, Louis's objections [34] are overruled.

Because this Court has denied a Certificate of Appealability, Louis's motion [35] to proceed in forma pauperis on appeal is likewise denied.

IT IS SO ORDERED this 5th day of November, 2020.


Timothy C. Batten, Sr.
United States District Judge

Orders on Motions

3:20-cv-00019-TCB LOUIS v. BRAUNER CASE CLOSED
on 08/19/2020

0months,2254,APPEAL,CLOSED,HABEAS,SLC3,SUBMDJ

U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

The following transaction was entered on 11/6/2020 at 9:50 AM EST and filed on 11/5/2020

Case Name: LOUIS v. BRAUNER

Case Number: 3:20-cv-00019-TCB

Filer:

WARNING: CASE CLOSED on 08/19/2020

Document Number: 41

Docket Text:

ORDER overruling [34] Objections and denying [35] Motion for Leave to Proceed in forma pauperis on Appeal. Signed by Judge Timothy C. Batten, Sr. on 11/5/2020. (dmb)

3:20-cv-00019-TCB Notice has been electronically mailed to:

Clint Christopher Malcolm cmalcolm@law.ga.gov, psmith@law.ga.gov

Paula K. Smith psmith@law.ga.gov

3:20-cv-00019-TCB Notice has been delivered by other means to:

CHARLES LOUIS

1142262

BALDWIN STATE PRISON

PO BOX 218

HARDWICK, GA 31034-0218

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CHARLES LOUS,
Petitioner,

vs.

DIRECTOR RONALD BRAWNER,
Respondent.

CIVIL ACTION FILE

NO. 3:20-cv-19-TCB

J U D G M E N T

This petition for a writ of habeas corpus having come before the court, Honorable Timothy C. Batten, Sr., United States District Judge, for consideration of the Defendant's Motion to Dismiss and the Magistrate Judge's Report and Recommendation, and having granted the Motion to Dismiss and adopted the Report and Recommendation, it is

Ordered and Adjudged that the petition for a writ of habeas corpus be, and the same hereby is, **denied** and **dismissed**. Certificate of Appealability is **denied**.

Dated at Atlanta, Georgia, this 19th day of August, 2020.

JAMES N. HATTEN
CLERK OF COURT

By: s/ D. Barfield
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
August 19, 2020
James N. Hatten
Clerk of Court

By: s/ D. Barfield
Deputy Clerk

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CHARLES LOUIS,

Petitioner,

v.

RONALD BRAWNER,

Respondent.

CIVIL ACTION FILE

NO. 3:20-cv-19-TCB

ORDER

This case comes before the Court on Magistrate Judge Russell G. Vineyard's report and recommendation (the "R&R") [25], which recommends granting Respondent Ronald Brawner's motion [15] to dismiss and denying Petitioner Charles Louis a certificate of appealability ("COA"). No objections have been filed.¹

¹ On July 15, the Court granted [30] Louis an extension of time until August 14 to respond. However, Louis has not filed any objections.

Appendix R

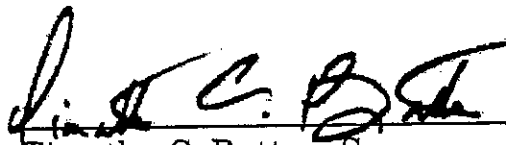
A district judge has a duty to conduct a "careful and complete" review of a magistrate judge's R&R. *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982) (per curiam) (quoting *Nettles v. Wainwright*, 677 F.2d 404, 408 (5th Cir. Unit B 1982)). This review may take different forms, however, depending on whether there are objections to the R&R. The district judge must "make a de novo determination of those portions of the [R&R] to which objection is made." 28 U.S.C. § 636(b)(1)(C). In contrast, those portions of the R&R to which no objection is made need only be reviewed for "clear error." *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006) (per curiam) (quoting *Diamond v. Colonial Life & Accident Ins.*, 416 F.3d 310, 315 (4th Cir. 2005)).²

² *Macort* dealt only with the standard of review to be applied to a magistrate's factual findings, but the Supreme Court has indicated that there is no reason for the district court to apply a different standard to a magistrate's legal conclusions. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Thus, district courts in this circuit have routinely reviewed both legal and factual conclusions for clear error. See *Tauber v. Barnhart*, 438 F. Supp. 2d 1366, 1373-74 (N.D. Ga. 2006) (collecting cases). This is to be contrasted with the standard of review on appeal, which distinguishes between the two. See *Monroe v. Thigpen*, 932 F.2d 1437, 1440 (11th Cir. 1991) (holding that when a magistrate's findings of fact are adopted by the district court without objection, they are reviewed on appeal under a "plain error standard" while questions of law always remain subject to de novo review).

After conducting a complete and careful review of the R&R, the district judge "may accept, reject, or modify" the magistrate judge's findings and recommendations. 28 U.S.C. § 636(b)(1)(C); *Williams*, 681 F.2d at 732. The district judge "may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1)(C).

The Court has conducted a careful and complete review of the R&R and finds no clear error in its factual or legal conclusions. Accordingly, the Court adopts as its order the R&R [25]. Brawner's motion [15] to dismiss is granted, Louis is not entitled to a COA, and the Clerk is directed to close this case.

IT IS SO ORDERED this 19th day of August, 2020.


Timothy C. Batten, Sr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CHARLES LOUIS,

Plaintiff,

v.

RONALD BRAWNER,

Defendant.

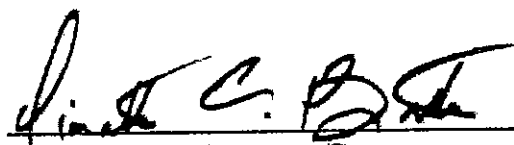
CIVIL ACTION FILE

NO. 3:20-cv-19-TCB

ORDER

Petitioner's motion [29] for extension of time to file objections to the Magistrate Judge's Report and Recommendation [25] is granted. Plaintiff's objections will be due on August 14, 2020.

IT IS SO ORDERED this 15th day of July, 2020.



Timothy C. Batten, Sr.
United States District Judge

Appendix G

Orders on Motions

3:20-cv-00019-TCB LOUIS v.
BRAWNER

0months,2254,HABEAS,SLC3

**U.S. District Court
Northern District of Georgia**

Notice of Electronic Filing

The following transaction was entered on 7/15/2020 at 10:12 AM EDT and filed on 7/15/2020

Case Name: LOUIS v. BRAWNER

Case Number: 3:20-cv-00019-TCB

Filer:

Document Number: 30

Docket Text:

ORDER granting [29] Motion for Extension of Time to file objections to the [25] Report and Recommendation. Objections due 8/14/2020. Signed by Judge Timothy C. Batten, Sr. on 7/15/2020. (dmb)

3:20-cv-00019-TCB Notice has been electronically mailed to:

Clint Christopher Malcolm cmalcolm@law.ga.gov, psmith@law.ga.gov

Paula K. Smith psmith@law.ga.gov

3:20-cv-00019-TCB Notice has been delivered by other means to:

CHARLES LOUIS
1142262
BALDWIN STATE PRISON
PO BOX 218
HARDWICK, GA 31034-0218

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

CHARLES LOUIS,	::	HABEAS CORPUS
Petitioner,	::	28 U.S.C. § 2254
	::	
v.	::	
	::	
RONALD BRAWNER,	::	CIVIL ACTION NO.
Respondent.	::	3:20-CV-0019-TCB-RGV

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge made in accordance with 28 U.S.C. § 636(b)(1) and this Court's Local Rule 72. Let the same be filed and a copy, with a copy of this order, be served upon counsel for the parties, or if a party is not represented, then directly upon said party.

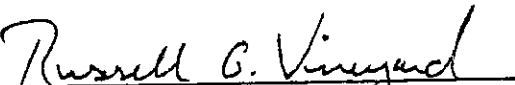
Each party may file written objections, if any, to the report and recommendation within fourteen (14) days of receipt of this order. 28 U.S.C. § 636(b)(1). Should objections be filed, they shall specify with particularity the alleged error(s) made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and

Appendix H

on appeal, the Court of Appeals will deem waived any challenge to factual and legal findings to which there was no objection, subject to interests-of-justice plain error review. 11th Cir. R. 3-1.

The Clerk is **DIRECTED** to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

IT IS SO ORDERED, this 22nd day of June, 2020.


RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

Other Orders/Judgments

3:20-cv-00019-TCB LOUIS v.
BRAWNER

0months,2254,HABEAS,SLC3

U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

The following transaction was entered on 6/22/2020 at 11:42 AM EDT and filed on 6/22/2020

Case Name: LOUIS v. BRAWNER

Case Number: 3:20-cv-00019-TCB

Filer:

Document Number: 26

Docket Text:

ORDER for Service of [25] Final Report and Recommendation, Final Report and Recommendation by Magistrate Judge Russell G. Vineyard. Each party may file written objections to the Report & Recommendation within 14 days of service. If no objections are filed, the Report & Recommendation may be adopted as the opinion and order of the District Court. Signed by Magistrate Judge Russell G. Vineyard on 6/22/2020. c:Financial Office(dmb)

3:20-cv-00019-TCB Notice has been electronically mailed to:

Clint Christopher Malcolm cmalcolm@law.ga.gov, psmith@law.ga.gov

Paula K. Smith psmith@law.ga.gov

3:20-cv-00019-TCB Notice has been delivered by other means to:

CHARLES LOUIS
1142262
BALDWIN STATE PRISON
PO BOX 218
HARDWICK, GA 31034-0218

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

CHARLES LOUIS,	::	HABEAS CORPUS
Petitioner,	::	28 U.S.C. § 2254
	::	
v.	::	
	::	
RONALD BRAWNER,	::	CIVIL ACTION NO.
Respondent.	::	3:20-CV-0019-TCB-RGV

FINAL REPORT AND RECOMMENDATION

Petitioner Charles Louis, presently confined in the Baldwin State Prison in Hardwick, Georgia, has filed this pro se 28 U.S.C. § 2254 petition to challenge his August 5, 2003, convictions in the Superior Court of Fayette County. This matter is currently before the Court on the petition, [Docs. 1; 6], respondent's motion to dismiss the petition as untimely, [Doc. 15], and petitioner's replies, [Docs. 23 & 24]. For the reasons that follow, it is **RECOMMENDED** that respondent's motion to dismiss, [Doc. 15], be **GRANTED** and that this action be **DISMISSED** as time barred.

I. PROCEDURAL HISTORY

After a Fayette County jury convicted petitioner of one count of child molestation, two counts each of aggravated child molestation and aggravated sexual battery, and one count of enticing a child for indecent purposes, the trial

Appendix I

court imposed a total sentence of fifty years of imprisonment. [Doc. 6; Doc. 16-1 at 1; Doc. 16-4 at 1-2]. On April 17, 2007, the Georgia Court of Appeals affirmed the trial court's judgment. [Doc. 16-1]. Petitioner did not pursue further direct review. [Doc. 1 at 1-2].

On April 12, 2011, petitioner filed a pro se habeas corpus petition in the Superior Court of Chattooga County. [Doc. 16-2]. Following transfer to the Superior Court of Baldwin County, an April 17, 2013, evidentiary hearing, appearance of counsel on behalf of petitioner on September 18, 2013, and a September 3, 2014, evidentiary hearing, the state habeas court entered a written order on December 21, 2015, denying the petition. [Doc. 16-4]. On January 7, 2019, the Georgia Supreme Court dismissed petitioner's application for a certificate of probable cause to appeal because, although he timely filed his application, he failed to file a notice of appeal in the habeas court. [Doc. 16-5].

Petitioner filed this § 2254 petition on December 22, 2019.¹ [Doc. 1 at 53]. Petitioner raises twenty-one grounds for relief, including that he is actually

¹ Pursuant to the "mailbox rule," a pro se prisoner's federal habeas petition is deemed filed on the date it is delivered to prison authorities for mailing. 28 U.S.C. foll. § 2254, Rule 3(d); Adams v. United States, 173 F.3d 1339, 1341 (11th Cir. 1999) (per curiam).

innocent. [Id. at 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45]. Petitioner asserts that the limitations period does not bar this petition because (1) the victim's medical records dated May 3, 2001, state that the victim denied "penile anal penetration" and, therefore, demonstrate petitioner's innocence and (2) petitioner's family hired an attorney, Marion B. Farmer, on February 8, 2008, to file a state habeas petition but the petition was not filed until April 12, 2011. [Id. at 5, 48-49; Docs. 1-4; 1-8; 1-9; 1-10; Doc. 23 at 1-2; Doc. 24 at 1]. Respondent moves to dismiss the petition as untimely. [Doc. 15-1 at 2-7]. Petitioner's replies add nothing significant to the discussion of the dispositive issue, i.e., the timeliness of his federal habeas petition. [Docs. 23 & 24].

II. DISCUSSION

A § 2254 petition is subject to a statutory one-year limitation period, which runs from the latest of the following:

(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.

28 U.S.C. § 2244(d)(1). In this case, there is no claim that the circumstances set forth in subparagraphs (B) through (D) above apply. Thus, pursuant to subparagraph (A), the one-year limitations period began to run on May 7, 2007, when the ten-day period for seeking certiorari review in the Georgia Supreme Court expired. See Gonzalez v. Thaler, 565 U.S. 134, 154 (2012) (“[W]ith respect to a state prisoner who does not seek review in a State’s highest court, the judgment becomes “final” under § 2244(d)(1)(A) when the time for seeking such review expires.”); Stubbs v. Hall, No. S19A1253, 2020 WL 1227277, at *6 (Ga. Mar. 13, 2020) (holding that when a Georgia prisoner does not seek review in the Georgia Supreme Court, his conviction becomes final when the twenty-day period for filing a petition for certiorari expires); Ga. S. Ct. R. 38(2) (providing twenty-day period for filing a petition for certiorari in the Georgia Supreme Court). Accordingly, absent tolling, petitioner had until May 7, 2008, to file this § 2254 petition.

Statutory tolling applies when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Petitioner’s state habeas petition did not toll the limitations period because petitioner filed it on April 12, 2011, approximately

two years and eleven months after the limitations period expired. See Sibley v. Culliver, 377 F.3d 1196, 1204 (11th Cir. 2004) (“A state court filing after the federal habeas filing deadline does not revive it.” (citation omitted)).

As to petitioner’s contention that the attorney he hired to do so failed to timely file his state habeas petition, the one-year limitations period set forth in “§ 2244(d) is subject to equitable tolling” when a petitioner “shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” Holland v. Florida, 560 U.S. 631, 649 (2010) (citation omitted). Even accepting petitioner’s argument that the attorney’s failure to promptly file his state habeas petition warrants equitable tolling, this § 2254 petition is still untimely. When petitioner retained the attorney on February 8, 2008, the limitations period had run for 277 days and arguably remained tolled until January 7, 2019, when the Georgia Supreme Court dismissed petitioner’s application for a certificate of probable cause to appeal. Petitioner then had 88 days, or until April 5, 2019, to file this § 2254 petition, but he did not file it until December 22, 2019, approximately 261 days too late.

A plea of actual innocence, if proved, can overcome the one-year limitations period for filing a federal habeas corpus action. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). “‘To be credible,’ a claim of actual innocence must be based on

reliable evidence not presented at trial.” Calderon v. Thompson, 523 U.S. 538, 559 (1998) (citing Schlup v. Delo, 513 U.S. 298, 324 (1995)). To establish his actual innocence, a movant must persuade “the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” Schlup, 513 U.S. at 329. Petitioner fails to meet this demanding standard.

Petitioner relies on medical records that were available in 2001, before his 2003 jury trial. Although these records show that the victim denied both “penile-anal penetration,” [Doc. 1-4], and “penile-vaginal penetration,” [Doc. 1-9], and further that the medical examination was normal, [Docs. 1-8; 1-10], they also note that the victim reported that petitioner “rubbed his penis against her bottom” on more than one occasion and threatened to kill her if she told, [Docs. 1-4; 1-9], and that “a normal medical examination does not rule out sexual abuse,” [Doc. 1-8; 1-10]. This evidence does not support a finding that no reasonable juror would have voted to find petitioner guilty beyond a reasonable doubt. See Hutchinson v. State, 651 S.E.2d 523, 524-25 (Ga. Ct. App. 2007) (child victim’s testimony that defendant “used his penis to rub her vaginal area, and made her touch his penis[, and] did not penetrate her vagina with his penis but forcefully rubbed it around her vaginal area” was sufficient to support defendant’s convictions for child

molestation, aggravated sexual battery, and aggravated child molestation); Childers v. State, 571 S.E.2d 420, 422 (Ga. Ct. App. 2002) (“The absence of physical injury did not mandate an acquittal [on charges of child molestation and aggravated sexual battery].”). Accordingly, this § 2254 petition is untimely and due to be dismissed.

III. CERTIFICATE OF APPEALABILITY

Under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, “the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).” Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Section 2253(c)(2) of Title 28 states that a certificate of appealability (“COA”) shall not issue unless “the applicant has made a substantial showing of the denial of a constitutional right.” A substantial showing of the denial of a constitutional right “includes showing 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, 483-84 (2000) (internal quotation marks omitted).

Other Orders/Judgments

3:20-cv-00019-TCB LOUIS v.
BRAWNER

0months,2254,HABEAS,SLC3

U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

The following transaction was entered on 6/22/2020 at 11:34 AM EDT and filed on 6/22/2020

Case Name: LOUIS v. BRAWNER

Case Number: 3:20-cv-00019-TCB

Filer:

Document Number: No document attached

Docket Text:

FINAL REPORT AND RECOMMENDATION recommending that [15] MOTION to Dismiss be dismissed. Signed by Magistrate Judge Russell G. Vineyard on 6/22/2020. (dmb)

3:20-cv-00019-TCB Notice has been electronically mailed to:

Clint Christopher Malcolm cmalcolm@law.ga.gov, psmith@law.ga.gov

Paula K. Smith psmith@law.ga.gov

3:20-cv-00019-TCB Notice has been delivered by other means to:

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