United States Court of Appeals for the Fifth Circuit

No. 21-20381

VANCE L. WHITE,

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. 4:20-CV-3883

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of August 24, 2021, for want of prosecution. The appellant failed to timely pay the filing fee.

No. 21-20381

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

Christina Rachal

By: _____
Christina C. Rachal, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VANCE L. WHITE,	§	CIVIL ACTION NO.
(TDCJ–CID #2033401)	§	4:20-cv-3883
Petitioner,	§	
	§	
	§	
vs.	§	JUDGE CHARLES ESKRIDGE
	§	
	§	
BOBBY LUMPKIN,	§	
Respondent.	§	

MEMORANDUM ON DISMISSAL

The statute of limitations bars the petition for a writ of *habeas corpus* brought by Petitioner Vance L. White under 28 USC § 2254. Dkt 1. This petition is dismissed with prejudice.

1. Background

White pleaded guilty in November 2015 to aggravated assault with a deadly weapon in Cause Number 143646701010 in the 179th Judicial District Court of Harris County, Texas. The court sentenced him to twelve years in prison. White didn't appeal his conviction. Dkt 1 at 3.

White filed his first state application for a writ of *habeas corpus* on June 13, 2019. See the Texas Judiciary Website at http://www.cca.courts.state.tx.us/. The Texas Court of Criminal Appeals dismissed it as noncompliant on June 26, 2019.

White filed his second state application on June 22, 2020. See ibid. The Texas Court of Criminal Appeals denied it without written order on findings of the trial court on September 2, 2020.

White filed his federal petition in November 2020. He contends that his conviction is void because he received ineffective assistance of counsel. Dkt 1 at 6.

It appeared upon initial review that the statute of limitations barred the claims. White was ordered to file a written statement

showing why his federal petition shouldn't be dismissed as time-barred under 28 USC § 2244(d). Dkt 5; see *Day v McDonough*, 547 US 198, 210 (2006). He did so, in a sixteen-page filing that largely argues the underlying merits of his claim without addressing or explaining the large passage of time prior to the filing of his federal petition. Dkt 6.

2. Legal standard

The Anti-Terrorism and Effective Death Penalty Act of 1996 imposed a one-year statute of limitations for federal *habeas corpus* petitions. The statute provides in part:

> (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.

28 USC § 2244(d)(1).

Most directly at issue here is § 2244(d)(1)(A), pertaining to limitations running from judgment finality at the conclusion of direct review. The Fifth Circuit explained in *Roberts v Cockrell* that "a decision becomes final by the conclusion of direct review or

the expiration of the time for seeking such review." 319 F3d 690, 693 (5th Cir 2003) (internal quotations omitted). Direct review includes a petition for a writ of *certiorari* to the United States Supreme Court, and so direct review concludes when the Supreme Court either rejects the petition or rules on its merits. Ibid. Absent appeal to the state's highest court, judgment becomes final when the time for seeking such review expires. *Gonzalez v Thaler*, 565 US 134, 137 (2012).

"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 USC § 2244(d)(2).

3. Analysis

a. Limitations

White's conviction became final when the time expired for filing an appeal in the Texas Court of Appeals. The state court convicted him on November 5, 2015. This gave him thirty days to file an appeal, or until December 5, 2015. See TRAP 26.2(a)(1). White didn't appeal. Absent any tolling, the limitations period began running the next day and closed one year later on December 5, 2016. See *Flanagan v Johnson*, 154 F3d 196, 200–02 (5th Cir 1998) (explaining limitations periods calculations). White didn't file his federal petition for a writ of *habeas corpus* by that date. He instead waited until November 13, 2020. The petition thus appears to be untimely under 28 USC § 2244(d)(1)(A).

He did file an application for state *habeas corpus* relief in June 2019, which the Texas Court of Criminal Appeals dismissed that same month. White filed a second state application in June 2020. The Texas Court of Criminal Appeals denied it without written order on findings of the trial court in September 2020. But the federal limitations period had already run by the time he filed the first application. As such, those state applications didn't toll the limitations period. *Scott v Johnson*, 227 F3d 260, 263 (5th Cir 2000).

The claims raised under § 2254 relating to White's conviction in Cause Number 143646701010 are time-barred unless he can show that a statutory or equitable exception applies. He doesn't allege or demonstrate that alternate triggers under AEDPA set a

different end to the limitations period. As to § 2244(d)(1)(B), nothing in the record indicates that any unconstitutional state action prevented him from filing an application for federal *habeas corpus* relief before the end of the limitations period. As to § 2244(d)(1)(C), the subject claims don't concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review. As to § 2244(d)(1)(D), White hasn't proven that any factual predicate was unknown or couldn't have been discovered with due diligence prior to the time his convictions became final.

As such, the text of § 2244(d)(1)(A) controls. The Fifth Circuit holds, "AEDPA's statutory language and construction clearly evinces a congressional intent to impose a one-year statute of limitations for the filing of federal habeas claims by state prisoners." *Davis v Johnson*, 158 F3d 806, 811 (5th Cir 1998). Such a bright-line demarcation in a statute of limitations may extinguish claims, but "their very purpose" is to do just that. *United States v Kubrick*, 444 US 111, 125 (1979). And federal courts are obliged to observe applicable statutes of limitations without regard to consequences. Indeed, the Fifth Circuit holds that statutes can't be ignored "merely because they are harsh. Harshness does not in itself constitute ambiguity." *First National City Bank v Compania de Aguaceros, SA*, 398 F2d 779, 784 (5th Cir 1968). That was said with respect to statutory notice requirements, but it has long pertained equally to statutes of limitations. See *Dedmon v Falls Products Inc*, 299 F2d 173, 178 (5th Cir 1962).

White's petition is nearly four years late. It may only be considered if equitable considerations apply.

b. Equitable tolling

Equitable tolling preserves claims in situations "'when strict application of the statute of limitations would be inequitable.'" *United States v Patterson*, 211 F3d 927, 930 (5th Cir 2000), quoting *Davis*, 158 F3d at 810. The Fifth Circuit holds that cases presenting "rare and exceptional circumstances" can equitably toll the one-year AEDPA statute of limitations. *Jackson v Davis*, 933 F3d 408, 410 (5th Cir 2019) (internal quotations omitted); see also *Holland v Florida*, 560 US 631, 649 (2010). It applies

principally where the defendant actively misleads the plaintiff about the cause of action or prevents assertion of rights in some extraordinary way. *United States v Wheaten*, 826 F3d 843, 851 (5th Cir 2016) (citations omitted) (discussing equitable tolling in context of § 2255); see also *Melancon v Kaylo*, 259 F3d 401, 408 (5th Cir 2001) (citations omitted).

White fails to show any extraordinary circumstance that prevented him from timely filing his federal petition for a writ of *habeas corpus*. The record in no way suggests that the State of Texas misled him or otherwise prevented him from filing within the deadline. The record instead shows that over three years passed between the dates when his conviction became final in December 2015 and when he first sought to file a state petition for *habeas corpus* relief in June 2019. Such delay counsels against the application of the tolling doctrine. See *Ott v Johnson*, 192 F3d 510, 514 (5th Cir 1999).

White filed both his state application and this petition *pro se*. He argues that the delay in filing his state petition may have been due to a misunderstanding of law and the lack of legal assistance. Dkt 6 at 1. The Fifth Circuit holds, however, that unfamiliarity with the constraints of law and lack of legal assistance generally provide no excuse for late filing. For example, see *Turner v Johnson*, 177 F3d 390, 392 (5th Cir 1999, *per curiam*) (citations omitted) (no excuse where due to unfamiliarity with legal process and lack of representation during applicable filing period); *Wheaten*, 826 F3d at 853 (citations omitted) (no excuse where failure to file petition within applicable limitations period was attributable solely to mistaken assumption that statute of limitations didn't apply to petition).

The record doesn't support entitlement to equitable tolling.

4. Request for an evidentiary hearing

White seeks an evidentiary hearing to address the issue of limitations. Dkt 6 at 5.

28 USC § 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on

> the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The Supreme Court has stated that this reflects congressional intent to "avoid unneeded evidentiary hearings" in federal *habeas corpus* proceedings. *Williams v Taylor*, 529 US 420, 436 (2000). No hearing is required "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief." *Schriro v Landrigan*, 550 US 465, 474 (2007). "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rules Governing Section 2254 Cases, Rule 8.

The reviewing court has discretion to reject the need for an evidentiary hearing. See *Conner v Quarterman*, 477 F3d 287, 293 (5th Cir 2007), citing *Roberts v Dretke*, 381 F3d 491, 497 (5th Cir 2004). On the one hand, a petitioner seeking a federal writ of *habeas corpus* may be entitled to an evidentiary hearing if there is a genuine factual dispute and the state hasn't yet afforded the petitioner a "full and fair hearing." *Clark v Johnson*, 202 F3d 760, 766 (5th Cir 2000), quoting *Perillo v Johnson*, 79 F3d 441, 444 (5th Cir 1996). But on the other, a petitioner isn't entitled to an evidentiary hearing "if his claims are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible.'" *Young v Herring*, 938 F2d 543, 560 (5th Cir 1991), quoting *Blackledge v Allison*, 431 US 63, 74 (1977); see also *Washington v Davis*, 715 F Appx 380, 385 (5th Cir 2017).

The above analysis shows that the statute of limitations plainly bars the § 2254 application brought by White. He also fails to show entitlement to equitable tolling. Those issues can be and were resolved based on the pleadings and state-court records. An evidentiary hearing is unnecessary where there are no relevant factual disputes that require development in order to assess the claims. *Robison v Johnson*, 151 F3d 256, 268–69 (5th Cir 1998), cert denied, 526 US 1100 (1999).

White provides no factual basis to support the need for an evidentiary hearing. The motion for such hearing is denied.

5. Certificate of appealability

Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. A certificate of appealability will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 USC § 2253(c)(2). This requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v McDaniel*, 529 US 473, 484 (2000). Where the court denies relief based 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 they "would find it debatable whether the district court was correct in its procedural ruling." Ibid.

The Court finds that jurists of reason wouldn't debate whether any procedural ruling in this case was correct. As such, White hasn't made the necessary showing to obtain a certificate of appealability.

A certificate of appealability will be denied.

6. Conclusion

The petition for a writ of *habeas corpus* brought by Petitioner Vance L. White is DENIED as untimely. Dkt 1.

The petition is DISMISSED WITH PREJUDICE.

The petitioner's motion for evidentiary hearing to address the issue of limitations is DENIED. Dkt 6.

A certificate of appealability is DENIED.

Any other pending motions are DENIED AS MOOT.

SO ORDERED.

Signed on July 9, 2021, at Houston, Texas.

Hon. Charles Eskridge
United States District Judge