United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 28, 2021
Lyle W. Cayce
Clerk

No. 20-20299

RONALD CHARLES WASHINGTON,

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. 4:18-CV-95

ORDER:

Ronald Charles Washington moves for a certificate of appealability ("COA") to appeal the dismissal of his 28 U.S.C. § 2254 petition, asserting that the district court erred by declining to equitably toll the statute of limitations.

To obtain a COA, a movant must make "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). Where, as here, the district court has denied a request for habeas relief on procedural grounds, the movant must show that jurists of reason could find it debatable both whether "the petition

states a valid claim of the denial of a constitutional right" and whether "the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Washington has not met this standard.[1]

Accordingly, IT IS ORDERED that the motion for a COA is DENIED; Washington's other pending motions are DENIED as moot.

/s/ Catharina Haynes
CATHARINA HAYNES
United States Circuit Judge

[1] In fact, Washington concedes that "jurists of reason would NOT find it debatable whether the district court was correct" in concluding that his petition was time-barred, as he had not provided any evidence warranting equitable tolling to the district court. Although he now submits materials purporting to show that he encountered difficulties in getting certain state court records, our court does not consider new evidence on appeal. *Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999). That rule is especially pertinent here, as Washington does not meaningfully explain why he did not present these materials—which apparently relate to events in the first eight months of 2017—to the district court in connection with his filings in December 2017.

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ON PETITION FOR REHEARING EN BANC

Before STEWART, HAYNES, and HO, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a motion for reconsideration (5TH CIR. R. 35 I.O.P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RONALD CHARLES WASHINGTON, TDCJ # 1839046,	§	
Petitioner,	§	
v.	§	CIVIL ACTION NO. H-18-0095
LORIE DAVIS	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER OF DISMISSAL

State inmate Ronald Charles Washington (TDCJ #1839046) filed a petition under 28 U.S.C. § 2254, challenging his criminal judgment. Petitioner alleges that he is in the State's custody under a procedurally invalid indictment. Respondent was ordered to answer the petition and moves for summary judgment, arguing that the petition is barred by the statute of limitations. For the reasons below, the motion is granted and the petition is dismissed with prejudice.

I. Background

On August 14, 2012, a Harris County Grand Jury issued an indictment against Petitioner for aggravated assault of a family member. *See Texas v. Ronald Charles Washington*, Case No. 1357621, available at https://www.hcdistrictclerk.com/eDocs/Public/Search.aspx. After pleading guilty, Petitioner was sentenced to

twenty-five years' imprisonment on February 18, 2013. *See id.* The Court of Appeals for the First District of Texas affirmed the judgment on September 18, 2014. *Washington v. State*, No. 01-13-00369-CR, slip op. (Tex. App.–Houston [1st], 2014). On January 5, 2015, Petitioner's extension of time to petition for discretionary review ended without such filing. *See* Dkt. #51-2 at 3.

Petitioner filed three state applications for a writ of habeas corpus or writ of mandamus. *See* WR-84,959-01; WR-84,959-02; WR-84,959-03. However, only one, WR-84,959-02, challenges Petitioner's underlying judgment. On September 9, 2015, Petitioner filed that state application for a writ of habeas corpus. WR-84,959-02. The application was denied without a written order or hearing on June 22, 2016. Dkt. #17-8. Petitioner filed the instant § 2254 petition on December 28, 2017.[1] *See* Case No. 4:18-cv-0095, Dkt. #1 at 7. The Court ordered Respondent to answer the petition. Respondent filed a motion for summary judgment. After Petitioner appealed an Order of the Court, Respondent again moved for summary judgment. *See* Dkt. #51.

II. Discussion

This federal habeas corpus proceeding is governed by the Anti-terrorism and Effective Death Penalty Act (the "AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). A federal habeas corpus petition challenging a state court judgment must

[1] Petitioner does not state that he placed his petition in the prison mailing system on this date. However, because it does not ultimately affect the Court's conclusions, the Court will construe the petition as filed on this date.

be filed within one year from the date that the challenged conviction becomes "final by the conclusion of direct review or the expiration of the time for seeking such review."[2] 28 U.S.C. § 2244(d)(1)(A).

Petitioner's conviction became final on January 5, 2015, when his time expired to pursue a petition for discretionary review. *See Roberts v. Cockrell*, 319 F.3d 690, 693-95 (5th Cir. 2003) (holding that a Texas conviction becomes final for limitations purposes when the time for seeking further direct review expires). That date triggered the statute of limitations for federal habeas corpus review, which expired one year later on January 6, 2016. *See* 28 U.S.C. § 2244(d)(1)(A). As a result, the pending habeas corpus petition, executed by Petitioner on December 28, 2017, is nearly three years late, and is barred from federal review unless a statutory or equitable exception applies to toll the limitations period.

A habeas petitioner may be entitled to statutory tolling under 28 U.S.C. § 2244(d)(2), which excludes from the AEDPA limitations period a "properly filed application for [s]tate post-conviction or other collateral review." A state application for collateral review is "*properly* filed" for purposes of § 2244(d)(2) "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (emphasis in original). In other words, "a properly filed [state] application [for collateral

[2] Petitioner does not otherwise allege that the statute of limitations should run from another possible date, for example, relating to when the facts of his claims became known to him.

review] is one submitted according to the state's procedural requirements." *Causey v. Cain*, 450 F.3d 601, 605 (5th Cir. 2006) (quoting *Lookingbill v. Cockrell*, 293 F.3d 256, 260 (5th Cir. 2002)).

As stated above, the record shows that Petitioner filed one relevant state application for habeas corpus on September 9, 2015. WR-84,959-02. The application was denied without a written order or hearing on June 22, 2016. *Id.* Because it was filed before his statute of limitations period ended, this application tolled the statute of limitations for two hundred and eighty-seven days. As a result, the statute of limitations now ran on October 19, 2016. Therefore, the federal petition is still filed approximately one year and two months too late.

The Fifth Circuit has held that the statute of limitation found in the AEDPA may be equitably tolled, at the district court's discretion, only "in rare and exceptional circumstances." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). Equitable tolling is an extraordinary remedy which is sparingly applied. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). The Supreme Court has clarified that a "'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 timely filing.'" *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Petitioner does not demonstrate that he has pursued federal relief with diligence or that equitable tolling is otherwise available. *See Holland*, 560 U.S. at 649; Dkt. #1. For example, Petitioner's claims indicate that he would have known of the factual predicates of his claims shortly after the indictment issued against him. Moreover, Petitioner had counsel for his criminal proceedings and he does not bring a claim of ineffective assistance of counsel that would otherwise indicate that he simply did not understand the process or requirements necessary for a valid indictment. Additionally, the record does not indicate, nor does Petitioner argue, that he could not have filed his petition before the statute of limitations ran. Instead, Petitioner simply waited approximately one and a half years after the Texas Court of Criminal Appeals denied his state application before he filed the instant petition. Equitable tolling is not available where the petitioner squanders his federal limitations period. *See, e.g., Ott v. Johnson*, 192 F.3d 510, 514 (5th Cir. 1999). In sum, Petitioner offers no explanation for the delay and the record does not reflect equitable tolling is appropriate.

While Petitioner does not argue that he is actually innocent of the crime for which he was convicted, actual innocence, if proven, may excuse a failure to comply with the one-year statute of limitations on federal habeas review. *See McQuiggin v. Perkins*, 569 U.S. 383 (2013). To show actual innocence, a habeas petitioner must present "new reliable evidence—whether it be

exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *see also House v. Bell*, 547 U.S. 518, 538 (2006) (stating that the *Schlup* standard is "demanding" and met "only in the 'extraordinary' case"). A petitioner must then show that it is more likely than not, in light of the newly-discovered evidence, that no reasonable juror would have convicted him. *Schlup*, 513 U.S. at 327. In this context, newly-discovered evidence of a petitioner's actual innocence refers to factual innocence, not legal insufficiency. *Bousely v. United States*, 523 U.S. 614, 623-24 (1998).

Petitioner has not presented newly discovered evidence. In fact, Petitioner's main complaints regarding his indictment – that the indictment did not have the signature of the grand jury foreman or the correct filing date – are factually incorrect. *See* Dkt. #17-14 at 6. In conclusion, Respondent's motion for summary judgment is granted and the § 2254 petition is denied as time-barred.

III. 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 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that reasonable

jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where denial of relief is based on procedural grounds, the petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its [] ruling." *Slack*, 529 U.S. at 484. Because jurists of reason would not debate whether the ruling in this case was correct, a certificate of appealability will not issue.

IV. Conclusion

As a result, Respondent's motion for summary judgment (Dkt. #51) is **GRANTED**. Petitioner's § 2254 petition (Dkt. #1) is **DENIED**, and the case is dismissed with prejudice. A certificate of appealability shall not issue.

SIGNED at Houston, Texas, on May 15, 2020.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE