

**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

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May 25, 2022

Clerk - Northern District of Alabama
U.S. District Court
101 HOLMES AVE
HUNTSVILLE, AL 35801

Appeal Number: 22-11108-J
Case Style: Christopher Surles v. Warden, et al
District Court Docket No: 5:21-cv-01236-RDP-JHE

The enclosed copy of this Court's Order of Dismissal 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."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Davina C Burney-Smith, J/lt
Phone #: (404) 335-6183

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11108-J

CHRISTOPHER SURLES,

Petitioner-Appellant,

versus

WARDEN,
ATTORNEY GENERAL OF THE STATE OF
ALABAMA, THE,

Respondents-Appellees.

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

Before: ROSENBAUM, GRANT, and LUCK, Circuit Judges,

BY THE COURT:

This appeal is DISMISSED, *sua sponte*, for lack of jurisdiction. Christopher Surles, a state prisoner proceeding *pro se*, seeks to appeal from the district court's February 18, 2022 memorandum opinion and separate final judgment dismissing his 28 U.S.C. § 2254 habeas petition. The timely filing of a notice of appeal in a civil case is a jurisdictional requirement, and we cannot entertain an appeal that is out of time. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 21 (2017); *Green v. Drug Enf't Admin.*, 606 F.3d 1296, 1300-02 (11th Cir. 2010). *Pro se* filings by prisoners are deemed filed when delivered to prison authorities for mailing. Fed. R. App. P. 4(c)(1); *Jeffries v. United States*, 748 F.3d 1310, 1314 (11th Cir. 2014)

(explaining that, absent evidence to the contrary, we assume that a prisoner delivered a filing to prison authorities on the date that he signed it).

A notice of appeal was due on March 21, 2022. *See* 28 U.S.C. § 2107(a) (providing that a notice of appeal is due 30 days after the entry of the judgment); Fed. R. App. P. 4(a)(1)(A), 26(a) (providing that if the last day of a period falls on a weekend or holiday, the time period runs until the next day that is not a weekend or holiday). Surles's notice of appeal was dated March 29, and his motion for leave to appeal *in forma pauperis* ("IFP") included a certificate of service stating that his notice of appeal and IFP motion were mailed on March 30. Even if Surles's notice of appeal were deemed filed on the earlier date, March 29, the notice of appeal would still be untimely, and we lack jurisdiction.

All pending motions are DENIED AS MOOT. No motion for reconsideration may be filed unless it complies with the timing and other requirements of Eleventh Circuit Rule 27-2 and all other applicable rules.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CHRISTOPHER SURLES,)
)
Petitioner,)
)
v.) Case No.: 5:21-cv-01236-RDP-JHE
)
WARDEN DEBORAH TONEY, et al.,)
)
Respondents.)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Christopher Surles (“Surles” or “Petitioner”), a person in custody under a judgment of a court of Alabama, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1). The petition was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b) for preliminary review. Upon consideration, the undersigned finds the petition is due to be dismissed because it is barred by the applicable statute of limitations.

I. Procedural History

A. Conviction and Sentence

In February 2014, the Talladega County Grand Jury indicted Surles and charged him with murder in violation of Alabama Code § 13-A-6-2 (1975). *See Surles v. State*, (CC-14-30). (Doc. 8-1 at 27-28). Following a trial, the jury returned a verdict of guilty for the charge of murder. (*Id.* at 180). On September 10, 2014, Surles was sentenced as a habitual offender with one prior Class A felony to life imprisonment. (Doc. 8-1 at 193-94). On October 10, 2014, Surles filed a motion for a new trial, which the trial court denied on November 12, 2014. (*Id.* 195-98, 200).

B. State Habeas Corpus Petition

Surles filed a petition for a writ of habeas corpus in the Alabama Court of Criminal Appeals on July 14, 2013, alleging he was being illegally restrained due to an unlawful and invalid arrest warrant. (Doc. 8-9). The circuit court held a hearing and dismissed the petition as meritless. (Doc. 8-1 at 29-36).

C. Direct Appeal

Surles filed a notice of appeal on September 10, 2014. (Doc. 8-1 at 187). In his appeal, Surles argued (1) the circuit court suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (2) the State committed prosecutorial misconduct by “double teaming” witnesses; (3) the circuit court deprived him of his Sixth Amendment right to an impartial jury; and (4) the circuit court erred by making prejudicial comments during the course of the trial. (Doc. 8-14). The Court of Criminal Appeals held that Surles failed to preserve any argument for appeal, and it affirmed his conviction on May 22, 2015. (*Id.*). Surles filed an application for rehearing, which was overruled. (Docs. 8-15 & 8-16). Surles filed a petition for writ of certiorari with the Alabama Supreme Court, which the court denied on November 13, 2015. (Docs. 8-17 to 8-20). On the same day, the Alabama Court of Criminal Appeals entered a certificate of judgment. (Doc. 8-21).

D. Rule 32 Petition

Surles has not filed any Rule 32 petitions.

E. Writ of Mandamus and Habeas Corpus Petitions

Surles filed a petition for writ of mandamus and several federal habeas corpus petitions in this Court and in the District Court for the Middle District of Alabama. (Docs. 8-22 to 8-33). The undersigned identified two of Surles’s habeas corpus petitions in his September 17, 2021 order, (doc. 4, at 1 n.1); however, it appears that Surles filed the other petitions under aliases. (Docs. 8-

22, 8-31 to 8-33). All were dismissed without prejudice for want of prosecution. (Doc. 4 at 1 n. 1; docs. 8-28, 8-31 to 8-33).

Surles filed this petition for a writ of habeas corpus in this court on September 10, 2021.¹ (Doc. 1). The undersigned then ordered Respondents to appear and show cause why the requested relief should not be granted. (Doc. 4). In response to the Show Cause Order, Respondents filed an Answer in which they assert the petition is due to be dismissed because it is barred by the one-year statute of limitations enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). (Doc. 8). By Order, the parties were advised Respondents’ Answer would be treated as a motion for summary dismissal pursuant to Rule 8(a) of the *Rules Governing Section 2254 Cases*, and Surles was provided twenty-one days to supply any additional evidentiary materials or legal arguments to support his petition. (Doc. 9). In support, Surles has filed a document titled “Writ for Summary Judgment.” (Doc. 10). The petition is ripe for review.

II. Claims

It appears Surles raises the following issues in his petition:

- (1) whether there was probable cause evidence to support his arrest warrant;
- (2) whether his Due Process rights were violated when he was prosecuted following an invalid arrest warrant;
- (3) whether he received discovery before trial pertaining to witness statements; and
- (4) whether the lack of discovery necessitates a reversal of his conviction.

(Doc. 1, at 5-10, 17-20).

III. Analysis

A. Statute of Limitations

AEDPA amended 28 U.S.C. § 2244 to read in part, as follows:

¹ Cases filed by incarcerated persons are deemed filed the date they are placed in the prison mail system. *See, e.g., Houston v. Lack*, 487 U.S. 266 (1988) (regarding the “mailbox rule”).

(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 facts supporting 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.

Surles's direct appeal was final on November 13, 2015, when the Alabama Court of Criminal Appeals issued the certificate of judgment. (Doc. 8-21). The one year statute of limitation period began running on February 11, 2016, ninety days after the certificate of judgment was entered in this case. Accordingly, he had until February 10, 2017, to file his petition with this Court. He did not. The period for filing lapsed at that time absent some exception to the general rule.

Under Section 2244(d)(2), the time period during which a properly filed application for State post-conviction relief is pending does not count against the statute of limitations. Surles did not file a proper postconviction application in State Court and is not entitled to any benefit from this provision.

Additionally, while actual innocence can overcome the statute of limitations in AEDPA, Surles has not asserted he is actually innocent. *McQuiggin v. Perkins*, -- U.S. --, 133 S. Ct. 1924 (2013); *see Ray v. Mitchem*, 272 Fed. Appx. 807, 2008 WL 887379 at *3 (11th Cir. 2008) (stating “[t]o meet the ‘threshold showing of innocence’ in order to justify ‘a review of the merits of the constitutional claims,’ the new evidence must raise ‘sufficient doubt about [the petitioner’s] guilt to undermine confidence in the result of the trial.’ “[A]ctual innocence” means factual innocence, not mere legal insufficiency.””) (citations omitted).

Furthermore, Surles alleges nothing showing he is entitled to equitable tolling. *See Arthur v. Allen*, 452 F.3d 1234, 1253 (11th Cir. 2006). Surles states he is entitled to equitable tolling because jurisdictional issues can be challenged at any time (doc. 1 at 13), but there is no jurisdictional exception to AEDPA. *See, e.g., Pope v. Butler*, No. 6:12-CV-2623-WMA-PWG, 2012 WL 4479263, at *1 (N.D. Ala. Sept. 24, 2012), quoting *Brown v. Patterson*, No. 2:10-CV-280-TMH, 2012 WL 3264896, at *3 (M.D. Ala. June 18, 2012), report and recommendation adopted, No. 2:10-CV-280-TMH, 2012 WL 3264556 (M.D. Ala. Aug. 9, 2012) (“While Pope argues ‘jurisdictional’ claim that is not governed by the one-year limitations period of § 2244(d)(1), ‘neither the statute nor federal case law makes such an exception for alleged jurisdictional issues arising under state law.’”). Accordingly, Surles’s claims are time barred.

B. Procedural Default

Even if Surles’s claims were not barred by the statute of limitations, they appear to be procedurally barred because Surles did not exhaust his state court remedies and it is now too late to return to state court and exhaust those claims. 28 U.S.C. § 2254(b); *see O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Surles’s claims concerning the arrest warrant were not presented to the state courts on direct appeal in the Alabama Court of Criminal Appeals or the Alabama Supreme

Court for consideration. Additionally, Surles's claims concerning the lack of discovery pertaining to witness testimony were presented to the State appellate courts, (doc. 8-14), and were found to be procedurally barred from appellate review. Thus, even if timely, procedural default would bar habeas review of Surles's claims.

III. Recommendation

Based on the foregoing, the undersigned **RECOMMENDS** Respondents' motion for summary dismissal be **GRANTED**, and the petition for a writ of habeas corpus be **DISMISSED WITH PREJUDICE**.

IV. Notice of Right to Object

Any party may file specific written objections to this report and recommendation. A party must file any objections with the Clerk of Court within fourteen (14) calendar days from the date the report and recommendation is entered. Objections should specifically identify all findings of fact and recommendations to which objection is made and the specific basis for objecting. Objections also should specifically identify all claims contained in the complaint that the report and recommendation fails to address. Objections should not contain new allegations, present additional evidence, or repeat legal arguments. An objecting party must serve a copy of its objections on each other party to this action.

Failing to object to factual and legal conclusions contained in the magistrate judge's findings or recommendations waives the right to challenge on appeal those same conclusions adopted in the district court's order. In the absence of a proper objection, however, the court may review on appeal for plain error the unobjected to factual and legal conclusions if necessary in the interests of justice. 11th Cir. R. 3-1.

On receipt of objections, a United States District Judge will review *de novo* those portions of the report and recommendation to which specific objection is made and may accept, reject, or modify in whole or in part, the undersigned's findings of fact and recommendations. The district judge must conduct a hearing if required by law. Otherwise, the district judge may exercise discretion to conduct a hearing or otherwise receive additional evidence. Alternately, the district judge may consider the record developed before the magistrate judge, making an independent determination on the basis of that record. The district judge also may refer this action back to the undersigned with instructions for further proceedings.

A party may not appeal the magistrate judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. A party may only appeal from a final judgment entered by a district judge.

DONE this 18th day of January, 2022.



JOHN H. ENGLAND, III
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CHRISTOPHER SURLES,)
Petitioner,)
v.) Case No. 5:21-cv-1236-RDP-JHE
WARDEN DEBORAH TONEY, et al.,)
Respondents.)

MEMORANDUM OPINION

On January 18, 2022, the Magistrate Judge entered a Report and Recommendation, which recommends Petitioner Christopher Surles's petition for a writ of habeas corpus be dismissed with prejudice as untimely filed. (Doc. 11). The Magistrate Judge advised Surles of his right to file specific written objections to the Report and Recommendation within 14 days. (*Id.*).

On January 26, 2022, the court received a document from Surles styled, "Affidavit for Default Judgment." (Doc. 12). To the extent Surles seeks a default judgment against Respondents, the request is **DENIED**, and any objection based on Respondents's alleged default is **OVERRULED**. Even if Respondents had failed to timely address pertinent claims, the government's tardiness in responding to a habeas petition does not entitle a petitioner to habeas relief in the form of a default judgment. *See Aziz v. Leferve*, 830 F.2d 184, 187 (11th Cir. 1987) (recognizing default judgment is not contemplated in habeas cases); *Goodman v. Keohane*, 663 F.2d 1044, 1047 n.4 (11th Cir. 1981) (rejecting the petitioner's argument that the government's tardiness in responding to his petition entitled him to habeas relief).

To the extent Surles further challenges the Magistrate Judge's findings, his objections are without merit. Specifically, Surles contends the Magistrate Judge failed to address his alleged

Sixth Amendment violation “in reference to the newly discovered evidence found at trial.” (Doc. 12 at 2). And, in response to the recommendation his petition be dismissed as untimely, Surles asserts “jurisdiction can be challenged at any time.” (*Id.*). These objections are **OVERRULED**.

With certain exceptions, which as explained below and by the Magistrate Judge are not applicable here, 28 U.S.C. § 2244 provides a one-year statute of limitations for habeas claims brought pursuant § 2254. As to Surles’s 2014 murder conviction, this one-year limitations period began to run on February 11, 2016, ninety days after the certificate of judgment was entered in his case. (See Doc. 8-21). Thus, Surles had until February 13, 2017, to file a federal habeas petition.¹ Because he did not, the period for filing expired (in the absence of the application of an exception to this general rule).

As the Magistrate Judge explained, (1) there are no applicable exceptions to the statute of limitations that apply in this case, and (2) Surles’s argument that jurisdictional challenges may be raised at any time is without merit. *See, e.g., Pope v. Butler*, No. 6:12-CV-2623-WMA-PWG, 2012 WL 4479263, at *1 (N.D. Ala. Sept. 24, 2012), quoting *Brown v. Patterson*, No. 2:10-CV-280-TMH, 2012 WL 3264896, at *3 (M.D. Ala. June 18, 2012), report and recommendation adopted, No. 2:10-CV-280-TMH, 2012 WL 3264556 (M.D. Ala. Aug. 9, 2012) (“While Pope argues ‘jurisdictional’ claim that is not governed by the one-year limitations period of § 2244(d)(1), ‘neither the statute nor federal case law makes such an exception for alleged jurisdictional issues arising under state law.’”).

¹ The limitations period expired on February 11, 2017. *See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (noting “limitations period expires on the anniversary of the date it began to run”). Because February 11, 2017, fell on a Saturday, the period extended to Monday, February 13, 2017. *See FED. R. CIV. P.* 6(a)(1)(C).

The court has considered the entire file in this action, together with the Report and Recommendation, and has reached an independent conclusion that the Report and Recommendation is due to be adopted and approved.

Accordingly, the court hereby **ADOPTS** and **APPROVES** the findings and recommendation of the Magistrate Judge as the findings and conclusions of this court. The petition for a writ of habeas corpus is due to be dismissed. A separate Order will be entered.

This court may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make such a showing, a “petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that “the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted). This court finds Surles’s claims do not satisfy either standard.

DONE and ORDERED this February 17, 2022.



R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CHRISTOPHER SURLES,)
Petitioner,)
v.) Case No. 5:21-cv-01236-RDP-JHE
WARDEN DEBORAH TONEY, et al.,)
Respondents.)

FINAL JUDGMENT

Consistent with the accompanying Memorandum Opinion and with Rule 58 of the Federal Rules of Civil Procedure, it is **ORDERED** that the petition is **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that a certificate of appealability is **DENIED**.

The parties shall bear their respective costs.

DONE and **ORDERED** this February 17, 2022.



R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

**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
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August 02, 2022

Christopher Surles
Donaldson CF - Inmate Legal Mail
100 WARRIOR LN
BESSEMER, AL 35023

Appeal Number: 22-11108-J
Case Style: Christopher Surles v. Warden, et al
District Court Docket No: 5:21-cv-01236-RDP-JHE

Electronic Filing

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, 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 on the Court's website.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Davina C Burney-Smith, J/lt
Phone #: (404) 335-6183

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11108-J

CHRISTOPHER SURLES,

Petitioner-Appellant,

versus

WARDEN,
ATTORNEY GENERAL OF THE STATE OF
ALABAMA, THE,

Respondents-Appellees.

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

Before: ROSENBAUM, GRANT, and LUCK, Circuit Judges.

BY THE COURT:

Christopher Surles's motion for reconsideration of our May 25, 2022 order dismissing this appeal for lack of jurisdiction is DENIED.

**Additional material
from this filing is
available in the
Clerk's Office.**