United States Court of Appeals for the Fifth Circuit

No. 22-10756

United States Court of Appeals
Fifth Circuit
FILED
November 7, 2022
Lyle W. Cayce
Clerk

REYNALDO PALOMO,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Northern District of Texas
USDC No. 3:22-CV-1151

ORDER:

Reynaldo Palomo, Texas prisoner # 2104888, moves for a certificate of appealability (COA) to challenge the dismissal of his 28 U.S.C. § 2254 application as time barred. He filed the § 2254 application to attack his conviction of capital murder, for which he was sentenced to life imprisonment.

Palomo does not assert error in the district court's time calculations, and thus he has waived any challenge to the determination that his § 2254 application was untimely filed. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Instead, he contends that he is entitled to equitable tolling

because, despite his due diligence, he was unable to file his § 2254 application within the one-year limitations period on account of extraordinary circumstances beyond his control. Noting his pro se status, Palomo asserts that, when he was transferred from one prison unit to another, he lost access to some of his legal materials for 30 days. He also asserts that staffing shortages at his new prison unit sometimes resulted in him being required to remain in the dayroom, where he was not allowed to work on his legal matters. Palomo attempts to support his COA application by incorporating by reference the arguments made in district court filings, but this is not permitted. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

To obtain a COA, Palomo must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where, as here, the district court has dismissed claims on procedural grounds, to obtain a COA the prisoner must show, at least, "that jurists of reason would find it debatable whether the [§ 2254 application] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Because Palomo fails to make the requisite showing, his request for a COA is DENIED. His motion to proceed in forma pauperis is likewise DENIED.

STUART KYLE DUNCAN
United States Circuit Judge

United States Court of Appeals for the Fifth Circuit

No. 22-10756

REYNALDO PALOMO,

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 Northern District of Texas
USDC No. 3:22-CV-1151

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

UNPUBLISHED ORDER

Before HIGGINBOTHAM, DUNCAN, and WILSON, *Circuit Judges.*

PER CURIAM:

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.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 17, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-10756 Palomo v. Lumpkin
USDC No. 3:22-CV-1151

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Casey A. Sullivan, Deputy Clerk
504-310-7642

Ms. Karen S. Mitchell
Mr. Reynaldo Palomo

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

REYNALDO PALOMO, TDCJ No. 2104888, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:22-cv-1151-N-BN

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Reynaldo Palomo, a Texas prisoner, challenges through this *pro se* 28 U.S.C. § 2254 habeas action his Dallas County conviction for capital murder, which resulted in a sentence of life imprisonment without parole. *See State v. Palomo*, F15-75896-K (Crim. Dist. Ct. No. 4, Dall. Cnty., Tex. Dec. 9, 2016), *aff'd*, No. 05-16-01459-CR, 2018 WL 636105 (Tex. App. – Dallas Jan. 31, 2018, *pet. ref'd, reh'g denied*); Dkt. No. 3 at 2-3. The Texas Court of Criminal Appeals (the CCA) refused his petition for discretionary review (PDR) on May 16, 2018 and denied rehearing on August 22, 2018. *See Palomo v. State*, PD-0252-18 (Tex. Crim. App.); Dkt. No. 3 at 3. Palomo did not petition the United States Supreme Court for a writ of certiorari. *See* Dkt. No. 3 at 3. And he filed his state habeas application no sooner than December 20, 2019. *See Ex parte Palomo*, W15-75896-K(A) (Crim. Dist. Ct. No. 4, Dall. Cnty., Tex.).

The undersigned United States magistrate judge, to whom this case is referred for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference from the United States District Judge David C. Godbey, therefore entered an order

questioning whether Palomo timely filed his Section 2254 application, setting out the chronology above and offering him an opportunity to respond. *See* Dkt. No. 9. Palomo responded. *See* Dkt. No. 10. And the undersigned enters these findings of fact, conclusions of law, and recommendation that the Court should dismiss the federal habeas petition with prejudice as time barred under Rule 4 of the Rules Governing Section 2254 Cases (Habeas Rule 4).

Legal Standards

Under Habeas Rule 4, a district court may summarily dismiss a Section 2254 habeas application "if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." *Id.*

> This rule differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses. The district court has the power under [Habeas] Rule 4 to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state. This power is rooted in "the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer."

Kiser v. Johnson, 163 F.3d 326, 328 (5th Cir. 1999) (quoting 28 U.S.C. foll. § 2254 Rule 4 Advisory Committee Notes).

And the Court may exercise this power to summarily dismiss this application with prejudice as time barred under Habeas Rule 4.

"[E]ven though the statute of limitations provision of the AEDPA is an affirmative defense rather than jurisdictional," a district court may dismiss a time barred Section 2254 application *sua sponte* under Habeas Rule 4. *Kiser*, 163 F.3d at 329. But, "'before acting on its own initiative' to dismiss an apparently untimely § 2254 petition as time barred, a district court 'must accord the parties fair notice and

an opportunity to present their positions.'" *Wyatt v. Thaler*, 395 F. App'x 113, 114 (5th Cir. 2010) (per curiam) (quoting *Day v. McDonough*, 547 U.S. 198, 210 (2006); alteration to original). *Cf. Ingram v. Director, TDCJ-CID*, No. 6:12cv489, 2012 WL 3986857, at *1 (E.D. Tex. Sept. 10, 2012) (a magistrate judge's report and recommendation gives the parties "fair notice that the case may be dismissed as time-barred, which [gives a petitioner] the opportunity to file objections to show that the case should not be dismissed based on the statute of limitation" (collecting cases)).

AEDPA establishes a one-year statute of limitations for federal habeas proceedings brought under 28 U.S.C. § 2254. *See* ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, Pub. L. 104-132, 110 Stat. 1214 (1996). The limitations period runs 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 U.S.C. § 2244(d)(1).

The time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the limitations period. *See id.* §

2244(d)(2).

The one-year limitations period is also subject to equitable tolling – "a discretionary doctrine that turns on the facts and circumstances of a particular case," *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), and only applies in "rare and exceptional circumstances," *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). "[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

Taking the second prong first, "[a] petitioner's failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify." *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (per curiam) (citation omitted). This "prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond [the litigant's] control." *Menominee Indian Tribe*, 577 U.S. at 257.[1]

[1] *See, e.g.*, *Farmer v. D&O Contractors*, 640 F. App'x 302, 307 (5th Cir. 2016) (per curiam) (holding that because "the FBI did not actually prevent Farmer or any other Plaintiff from filing suit" but instead "advised Farmer that filing suit would have been against the FBI's interest" and "that the RICO claims could be filed after the investigation concluded," "[a]ny obstacle to suit was ... the product of Farmer's mistaken reliance on the FBI, and a party's mistaken belief is not an extraordinary circumstance" (citation omitted)).

But "'[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.' What a petitioner did both before and after the extraordinary circumstances that prevented him from timely filing may indicate whether he was diligent overall." *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019) (quoting *Holland*, 560 U.S. at 653; footnote omitted).

And a showing of "actual innocence" can also overcome AEDPA's statute of limitations. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the actual innocence gateway is only available to a petitioner who presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* at 401 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).

That is, the petitioner's new, reliable evidence must be enough to persuade the Court that "'no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Id.* at 386 (quoting *Schlup*, 513 U.S. at 329).[2]

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[2] *See also Johnson v. Hargett*, 978 F.2d 855, 859-60 (5th Cir. 1992) ("The Supreme Court has made clear that the term 'actual innocence' means *factual*, as opposed to *legal*, innocence – 'legal' innocence, of course, would arise whenever a constitutional violation by itself requires reversal, whereas 'actual' innocence, as the Court stated in *McCleskey [v. Zant*, 499 U.S. 467 (1991)], means that the person did not commit the crime." (footnotes omitted)); *Acker v. Davis*, 693 F. App'x 384, 392-93 (5th Cir 2017) (per curiam) ("Successful gateway claims of actual innocence are 'extremely rare,' and relief is available only in the 'extraordinary case' where there was 'manifest injustice.' *Schlup*, 513 U.S. at 324, 327. When considering a gateway claim of actual innocence, the district court must consider all of the evidence, 'old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.' *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks and citations omitted). 'Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do."' *Id.*

Analysis

The timeliness of most Section 2254 applications is determined under Section 2244(d)(1)(A), based on the date on which the judgment became final. A state criminal judgment becomes final under AEDPA "when there is no more 'availability of direct appeal to the state courts.'" *Frosch v. Thaler*, No. 2:12-cv-231, 2013 WL 271423, at *1 (N.D. Tex. Jan. 3, 2013) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009)), *rec. adopted*, 2013 WL 271446 (N.D. Tex. Jan. 24, 2013).

Because Palomo did not petition the United States Supreme Court for certiorari review, the applicable state judgment became final under AEDPA no later than November 20, 2018 – 90 days after the CCA denied rehearing (on August 22, 2018) after refusing Palomo's PDR (on May 16, 2018). *See Roberts v. Cockrell*, 319 F.3d 690, 692 (5th Cir. 2003) (observing that, if a petitioner halts the review process, "the conviction becomes final when the time for seeking further direct review in the state court expires" and noting that the Supreme Court allows 90 days for filing a petition for certiorari following the entry of judgment); SUP. CT. R. 13.

And, "[b]ecause [Palomo's] state habeas petition was not filed within the one-year period" that commenced on that date, "it did not statutorily toll the limitation clock." *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013) (citing *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (citing, in turn, 28 U.S.C. § 2244(d)(2))).

Accordingly, under Section 2244(d)(1)(A), the Section 2254 application was

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(quoting *Schlup*, 513 U.S. at 329). 'The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.' *Id.*" (citations modified)).

filed more than three years and five months too late. The application is therefore due to be dismissed as untimely under Habeas Rule 4 absent statutory or equitable tolling of the limitations period or establishment of actual innocence.

In support of equitable tolling, Palomo explains that he did not understand how Section 2244(d)(2) operates and further argues that lockdowns and inadequate access to the prison's law library prevented the timely filing of his federal habeas application. *See* Dkt. No. 10.

But, in this circuit, there is a "long line of cases holding that mere ignorance of the law or of statutes of limitations is insufficient to warrant tolling." *Felder v. Johnson*, 204 F.3d 168, 172 (5th Cir. 2000) (citations omitted); *see, e.g.*, *Bartley v. La. Dep't of Corrs.*, Civ. A. No. 06-2441, 2009 WL 2872932, at *6 (E.D. La. Sept. 2, 2009) ("Bartley's ignorance of the law ... has caused his downfall. There is no evidence to show that the state prevented him from filing his federal petition or that he was deceived in any way by either court or attorney with regard to the appropriate forum in which to file. Without such a showing, this court must find his federal habeas application untimely filed." (footnote omitted)); *Webster v. Stephens*, No. 4:13-cv-859-A, 2014 WL 201707, at *2 (N.D. Tex. Jan. 17, 2014) ("It is well settled ... that a petitioner's *pro se* status, indigence and lack of knowledge of the law, all common problems of inmates who are trying to pursue postconviction habeas relief, do not warrant equitable tolling of the limitations period." (citing *Felder*, 204 F.3d at 171-72; *Turner v. Johnson*, 177 F.3d 390, 391 (5th Cir. 1999))); *Zepeda v. Stephens*, No. 3:14-cv-2072-B, 2015 WL 105165, at *3 (N.D. Tex. Jan. 6, 2015) ("Petitioner's *pro se*

status, lack of legal training, or ignorance of the law do not justify equitable tolling. His conclusory claim that he did not have adequate access to a law library does not show he is entitled to equitable tolling. And whether claims have merit is not a factor in determining equitable tolling. Petitioner has not shown he is entitled to equitable tolling." (citing *Felder*, 204 F.3d at 171-72)).

So, because Palomo fails to explain how another provision of Section 2244(d)(1) could apply here, fails to advance a claim of tolling under the narrow actual innocence gateway, and fails to provide allegations that establish either prong of equitable tolling – that he pursued his rights diligently and that an extraordinary circumstance beyond his control prevented his timely filing of the federal petition – the Court should dismiss the Section 2254 petition with prejudice as time barred.

Recommendation and Directions to Clerk

Under Rule 4 of the Rules Governing Section 2254 Cases, the Court should dismiss Petitioner Reynaldo Palomo's 28 U.S.C. § 2254 habeas application with prejudice. And the Court should direct that the Clerk of Court serve any order accepting or adopting this recommendation on the Texas Attorney General.

The Clerk shall serve electronically a copy of this recommendation and the petition, along with any attachments thereto and brief in support thereof, on the Texas Attorney General as counsel for Respondent, directed to the attention of Edward L. Marshall, Chief, Criminal Appeals Division, Texas Attorney General's Office. *See* RULE 4, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: June 30, 2022

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

REYNALDO PALOMO, TDCJ No. 2104888, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:22-cv-1151-N

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND DENYING A CERTIFICATE OF APPEALABILITY

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case. An objection was filed by Petitioner. The District Court reviewed *de novo* those portions of the proposed findings, conclusions, and recommendation to which objection was made, and reviewed the remaining proposed findings, conclusions, and recommendation for plain error. Finding no error, the Court ACCEPTS the Findings, Conclusions, and Recommendation of the United States Magistrate Judge.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court DENIES a certificate of appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions, and Recommendation filed in this case in support of its finding that Petitioner has

failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" or "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).[1]

But, if Petitioner elects to file a notice of appeal, he must either pay the $505 appellate filing fee or move for leave to appeal *in forma pauperis.*

SO ORDERED this 27th day of July, 2022.

DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE

[1] Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.