

UNPUBLISHED

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

No. 21-7590

ERIC G. BANKS, SR.,

Petitioner - Appellant,

v.

MARYLAND ATTORNEY GENERAL; WARDEN CHRISTOPHER S. SMITH,

Respondents - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Richard D. Bennett, Senior District Judge. (1:20-cv-02445-RDB)

Submitted: February 14, 2023

Decided: May 23, 2023

Before GREGORY, Chief Judge, RICHARDSON, Circuit Judge, and KEENAN, Senior
Circuit Judge.

Dismissed by unpublished per curiam opinion.

Eric G. Banks, Sr., Appellant Pro Se. Andrew John DiMiceli, Assistant Attorney General,
OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for
Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Eric G. Banks, Sr., seeks to appeal the district court's order dismissing as untimely his 28 U.S.C. § 2254 petition. *See Gonzalez v. Thaler*, 565 U.S. 134, 148 & n.9 (2012) (explaining that § 2254 petitions are subject to one-year statute of limitations, running from latest of four commencement dates enumerated in 28 U.S.C. § 2244(d)(1)). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When, as here, the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez*, 565 U.S. at 140-41 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Banks has not made the requisite showing. Accordingly, we deny Banks' motions for a certificate of appealability and for summary judgment and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: May 23, 2023

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Petitioner - Appellant

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MARYLAND ATTORNEY GENERAL; WARDEN CHRISTOPHER S. SMITH

Respondents - Appellees

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: May 23, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUITNo. 21-7590, Eric Banks, Sr. v. Maryland Attorney General
1:20-cv-02445-RDB

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED

COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN

BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

ERIC G. BANKS, SR.,

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Petitioner,

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v.

*

Civil Action No. RDB-20-2445

WARDEN CHRISTOPHER S. SMITH¹ and
THE ATTORNEY GENERAL OF THE
STATE OF MARYLAND,

*

*

Respondents.

*

MEMORANDUM OPINION

Self-represented Petitioner Eric G. Banks, Sr. filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his 2014 conviction in the Circuit Court for Anne Arundel County, Maryland for second-degree murder. ECF No. 1. On November 16, 2020, Respondents filed a Limited Answer arguing that the Petition is time-barred under 28 U.S.C. § 2244(d). ECF No. 7. Banks responded and filed a Motion for Summary Judgment, as well as a Motion for Leave to Proceed in Forma Pauperis. ECF Nos. 11, 12, 14, 15.

There is no need for an evidentiary hearing. *See* Rule 8(a), *Rules Governing Section 2254 Cases in the United States District Courts* and Local Rule 105.6 (D. Md. 2021); *see also Fisher v. Lee*, 215 F. 3d 438, 455 (4th Cir. 2000) (petitioner not entitled to a hearing under 28 U.S.C. § 2254(e)(2)). For the reasons that follow, Banks's Motion for Summary Judgment is denied, the Petition is dismissed, and a certificate of appealability shall not issue. Because Banks previously paid the filing fee, his Motion for Leave to Proceed in Forma Pauperis is denied as moot.

¹ Banks is incarcerated at the Maryland Correctional Institution in Jessup, Maryland, where the current Warden is Christopher S. Smith. Therefore, the Clerk shall amend the docket with the proper Respondent. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (stating that "in habeas challenges to present physical confinement . . . the proper respondent is the warden of the facility where the prisoner is being held).

Background

On April 4, 2014, Banks was convicted by a jury of second-degree murder and sentenced to 30 years of incarceration. *State of Maryland v. Banks*, Case No. 02-K-13-000246 (Cir. Ct. for Anne Arundel Cnty.); ECF No. 7-1 at 24.² On April 21, 2014, Banks filed a notice of appeal, and on April 30, 2014, he filed an application for a three-judge panel review of his sentence. ECF No. 1 at 22-23, 83-87. Following a hearing in the Circuit Court for Anne Arundel County on September 9, 2014, the three-judge panel denied Banks's request for a sentence reduction by memorandum opinion and order dated November 20, 2014. *Id.* at 123-29.

While his direct appeal and application for panel review were pending, Banks filed a motion for modification of sentence, which the circuit court denied on July 8, 2014. *Id.* at 79-82. On October 9, 2015, Banks filed a motion for drug treatment and a second motion for modification of sentence. *Id.* at 19. Both were denied on October 13, 2015 – the former without prejudice and the latter because the sentence modification had already been considered the year prior. *Id.* at 19, 147.

On direct appeal, the Court of Special Appeals of Maryland affirmed Banks's convictions by unreported opinion filed on June 30, 2016. *Banks v. State*, No. 304, Sept. Term 2014 (Md. Ct. Spec. App. June 30, 2016); ECF No. 7-1 at 88-119. Banks then filed a petition for writ of certiorari, which the Court of Appeals of Maryland denied on September 29, 2016. *Banks v. State*, 146 A.3d 465 (Table) (Md. 2016); ECF No. 7-1 at 122. It does not appear that Banks sought further review in the Supreme Court. *See* ECF No. 1 at 3-4; ECF No. 7-1 at 18.

On February 10, 2017, Banks filed a petition for post-conviction relief in state circuit court. ECF No. 7-1 at 18. On August 31, 2017, the petition was withdrawn without prejudice, before

² Citations refer to the pagination assigned by the Court's Case Management and Electronic Case Files system.

being refiled on September 18, 2017. *Id.* at 14-15. After a hearing on January 22, 2019, the post-conviction court denied the petition by memorandum opinion dated August 28, 2019, and entered on August 29, 2019. *Id.* at 7, 130-44. On October 8, 2019, Banks filed an application for leave to appeal with the Court of Special Appeals. *Id.* at 7. By order dated November 4, 2019, the circuit court directed Banks to show cause why the application for leave to appeal should not be stricken as untimely filed pursuant to Maryland Rules 8-202 and 8-203. *Id.* at 145. Banks responded; nonetheless, his application for leave to appeal was ultimately dismissed as untimely on January 9, 2020. *Id.* at 146.

On August 19, 2020, Banks filed his Petition in this Court. *See* ECF No. 1 at 50; *Houston v. Lack*, 487 U.S. 266, 276 (1988) (holding that a prisoner's submission is deemed to have been filed on the date it was deposited in the prison mailing system).³ He claims that the State failed to prove his guilt beyond a reasonable doubt, the Pre-Sentencing Investigation report was inaccurate, the State committed prosecutorial misconduct, and the court erred several times. ECF No. 1 at 21-48. In addition, Banks claims that trial counsel was ineffective in failing to: (a) move for a new trial; (b) object to certain evidence, improper testimonies, and the prosecutor's unsupported statements; (c) have knowledge of the information necessary to challenge the charges; (d) challenge the testimony of the State's primary witness; and (e) highlight important information on cross-examination and during closing arguments. *Id.*

Discussion

The threshold issue in this case is the timeliness of the petition. Only if the Petition is timely may the Court reach the merits of Banks's claims.

³ It is unclear when Banks deposited his Petition in the prison's mailing system. However, because Banks certified that he mailed the Petition to the Clerk on August 19, 2020, the Court shall consider that date as the filing date.

A one-year statute of limitations applies to habeas petitions in non-capital cases for persons convicted in state court. *See* 28 U.S.C. § 2244(d)(1); *Wall v. Kholi*, 562 U.S. 545, 550 (2011).

Section 2244(d)(1) provides that:

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 U.S.C. § 2244(d)(1).

Pursuant to § 2244(d)(2), “[t]he 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 U.S.C. § 2244(d)(2). The limitation period may also be subject to equitable tolling in appropriate cases. *Holland v. Florida*, 560 U.S. 631, 645 (2010); *Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000).

Here, Banks’s conviction became final for direct review purposes on December 28, 2016,⁴ or 90 days after the Court of Appeals of Maryland denied his petition for writ of certiorari. *See*

⁴ Although Banks filed two motions for modification of sentence, they had no tolling effect because the circuit court denied them on July 8, 2014 and October 13, 2015, before the judgment of conviction became final, and the limitation period had not yet begun to run.

Sup. Ct. Rule 13.1 (requiring petition for a writ of certiorari to be filed within 90 days of date of judgment from which review is sought). He filed his petition for post-conviction relief in state circuit court 44 days later, on February 10, 2017, thus leaving 321 days in the one-year period. When Banks withdrew his petition on August 31, 2017, another 18 days elapsed before Banks refiled the petition on September 18, 2017, leaving 303 days in the one-year period. The limitations period remained tolled until August 29, 2019,⁵ when the post-conviction petition was denied.

Forty days after the denial of post-conviction relief, Banks filed an application for leave to appeal, which the circuit court dismissed as untimely filed. *See* Md. Rule 8-202(a) (“the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken”). Because the application was untimely, it was not deemed “properly filed” pursuant to § 2244(d)(2) and therefore did not toll the limitations period. *See Evans v. Chavis*, 546 U.S. 189, 191 (2006). Thus, between the date on which Banks should have, but failed, to file a timely application for leave to appeal from the denial of post-conviction relief, September 28, 2019, and the date on which he filed the Petition in this Court, August 19, 2020, another 326 days elapsed. In sum, Banks’s federal habeas Petition was filed 388 days, or over a year, after his judgment became final.

In his response, Banks states that he did not receive a copy of the denial of his state post-conviction petition until September 16, 2019. ECF No. 11 at 4; ECF No. 12 at 4. Banks, however, does not provide any reasons to indicate why he waited another 22 days, or until October 8, 2019, to file his application for leave to appeal. *See id.* In any event, this Court has no jurisdiction to alter or amend the state court’s ruling on the timeliness of his application for leave to appeal. As

⁵ In an abundance of caution, the Court shall use the date the order was entered on the docket rather than the date it was signed.

noted, because that application was not properly filed, it cannot serve to statutorily toll the limitations period.

The Petition is time-barred under 28 U.S.C. § 2244(d). To the extent Banks asserts that he is entitled to equitable tolling, he has not shown either that there was wrongful conduct by Respondents that prevented him from filing on time, or that there were “extraordinary circumstances” beyond his control that prevented timely filing of a petition. *Harris*, 209 F.3d at 330; *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (en banc). The application of equitable tolling must be “guarded and infrequent” and “reserved for those rare instances where—due to circumstances external to the party’s own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.” *Harris*, 209 F.3d at 330. Ignorance of the law is not a basis for equitable tolling. *See United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004).

As Banks has not stated a basis for equitable tolling, the Petition shall be dismissed.

Certificate of Appealability

When a district court dismisses a habeas petition, a certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a petition is denied on procedural grounds, the petitioner must show that reasonable jurists “would find it debatable 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 v. McDaniel*, 529 U.S. 473, 478 (2000); *see Buck v. Davis*, 137 S.Ct. 759, 773 (2017). Because Banks fails to satisfy this standard, the Court declines to issue a certificate of appealability. Banks may still request that the United States Court of Appeals for the Fourth Circuit issue such a certificate. *See Lyons v. Lee*, 316 F.3d 528, 532 (4th Cir. 2003).

Conclusion

For the foregoing reasons, the Court will dismiss the Petition for Writ of Habeas Corpus and decline to issue a certificate of appealability. Banks's Motion for Summary Judgment and Motion for Leave to Proceed in Forma Pauperis shall be denied. A separate Order follows.

.9/29/2021
Date

/s/
RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

ERIC G. BANKS, SR.,

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Petitioner,

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v.

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Civil Action No. RDB-20-2445

WARDEN CHRISTOPHER S. SMITH and
THE ATTORNEY GENERAL OF THE
STATE OF MARYLAND,

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Respondents.

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ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 29th day of September, 2021, by the United States District Court for the District of Maryland, hereby ORDERED that:

1. The Clerk SHALL AMEND the docket to substitute Warden Christopher S. Smith for Warden Acluff as Respondent;
2. Banks's Motion for Summary Judgment (ECF No. 14) IS DENIED;
3. Banks's Motion for Leave to Proceed in Forma Pauperis (ECF No. 15) IS DENIED as moot;
4. The Petition for Writ of Habeas Corpus IS DISMISSED;
5. The Court DECLINES to issue a Certificate of Appealability;
6. The Clerk SHALL CLOSE this case; and
7. The Clerk SHALL SEND a copy of this Order and the foregoing Memorandum Opinion to Banks and to counsel for Respondents.

/s/

RICHARD D. BENNETT
UNITED STATES DISTRICT JUDGE