

S.D.N.Y. - N.Y.C.
22-cv-6388
Vyskocil, J.
Netburn, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of February, two thousand twenty-four.

Present:

Susan L. Carney,
Richard J. Sullivan,
Eunice C. Lee,
Circuit Judges.

Marvin Holmes,

Petitioner-Appellant,

v.

23-7062

Mark Miller, Superintendent,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling," as to the untimeliness of the Appellant's petition filed pursuant to 28 U.S.C. § 2254. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

Catherine O'Hagan Wolfe


UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of February, two thousand twenty-four.

Marvin Holmes,

ORDER

Petitioner - Appellant,

Docket No. 23-7062

v.

Mark Miller, Superintendent,

Respondent - Appellee.

On September 19, 2023, the Court issued a notice pursuant to Federal Rule of Appellate Procedure 4(a)(4), staying this appeal due to a pending motion in the district court. The district court having denied the motion for reconsideration in an order dated November 20, 2023,

IT IS ORDERED that the stay of this appeal is hereby lifted.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe



**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

**DEBRA ANN LIVINGSTON
CHIEF JUDGE**

Date: February 9, 2024
Docket #: 23-7062
Short Title: Holmes v. Miller

**CATHERINE O'HAGAN WOLFE
CLERK OF COURT**

DC Docket #: 1:22-cv-6388
DC Court: SDNY (NEW YORK
CITY)
Trial Judge - Mary Kay Vyskocil

NOTICE OF CASE MANAGER CHANGE

The case manager assigned to this matter has been changed.

Inquiries regarding this case may be directed to 212-857-8565.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: 8/8/2023
DATE FILED: 8/8/2023

MARVIN HOLMES,

Plaintiff,

-against-

MARK MILLER, *Superintendent, Green Haven
Correctional Facility*,

Defendants.

1:22-cv-06388-MKV

**ORDER ADOPTING REPORT
AND RECOMMENDATION**

MARY KAY VYSKOCIL, United States District Judge:

Marvin Holmes, proceeding *pro se*, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on July 26, 2022. *See* Petition for Writ of Habeas Corpus [ECF No. 2]. On January 17, 2023, the Court referred the petition to Magistrate Judge Sarah Netburn. *See* Order Referring Case to Magistrate Judge [ECF No. 13].

On July 11, 2023, Magistrate Judge Netburn issued a thorough Report and Recommendation (“R&R”) recommending that the Court deny Petitioner Marvin Holmes’ petition in its entirety, decline to issue a certificate of appealability, and certify pursuant to 28 U.S.C. § 1915(a) that any appeal would not be taken in good faith. *See* Report and Recommendation [ECF No. 15] (“R&R”).

The parties had fourteen days to file objections. *See* 28 U.S.C. § 636 (b)(1); Fed. R. Civ. P. 72(b)(2); R&R 8. None were filed. When there are no objections, the Court reviews the R&R for clear error. *See, e.g., Urena v. People of State of New York*, 160 F. Supp. 2d 606, 609–10 (S.D.N.Y. 2001) (“To accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record.” (quoting *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985))).

The Court has reviewed the R&R for clear error. The Court finds none and agrees with Magistrate Judge Netburn that the petition is time-barred, and that Mr. Holmes is not entitled to equitable tolling or the actual innocence exception. The Antiterrorism and Effective Death Penalty Act (“AEDPA”) imposes a one-year statute of limitations on applications for a writ of habeas corpus brought pursuant to the judgment of a state court. *See* 28 U.S.C. § 2244(d). Here, Holmes’ petition was brought outside of that one-year period, and indeed, more than ten years after his conviction became final. *See People v. Holmes*, 16 N.Y.3d 895, 949 N.E.2d 979, 926 N.Y.S.2d 31 (N.Y. 2011) (denying application for leave to appeal). Moreover, Holmes is not entitled to equitable tolling because, even assuming that his counsel failed to inform him when his conviction became final, “[p]roblems such as . . . insufficiency of legal assistance are not ‘extraordinary’ such that they warrant equitable tolling of the AEDPA limitation period.” *Martinez v. Kuhlmann*, No. 99-CV-1094, 2000 WL 622626, at *3 (S.D.N.Y. May 15, 2000); *see also Holland v. Florida*, 560 U.S. 631, 651–52 (2010) (“[A] garden variety claim of excusable neglect’ . . . does not warrant equitable tolling.”). Finally, Holmes does not “show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt,” precluding application of the actual innocence exception in this case. *Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 114 (2d Cir. 2000) (citation omitted).

The Court therefore adopts the R&R in its entirety as the opinion of the Court. The habeas corpus petition is DENIED. Finding that Mr. Holmes has not demonstrated a denial of a constitutional right, a certificate of appealability is DENIED. The Court further certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and *in forma pauperis* status is therefore denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444–45 (1962).

The Clerk of Court is respectfully requested to close this case.

SO ORDERED.

Date: August 8, 2023
New York, NY

Mary Kay Vyskocil
MARY KAY VYSKOCIL
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

MARVIN HOLMES,

Plaintiff,

22 CIVIL 6388 (MKV)(SN)

-against-

JUDGMENT

MARK MILLER, Superintendent, Green Haven
Correctional Facility,

Defendant.

-----X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated August 8, 2023, the Court adopts the Report & Recommendation in its entirety as the opinion of the Court. The habeas corpus petition is DENIED. Finding that Mr. Holmes has not demonstrated a denial of a constitutional right, a certificate of appealability is DENIED. The Court further certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and *in forma pauperis* status is therefore denied for the purpose of an appeal. See *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962); accordingly, the case is closed.

Dated: New York, New York
August 08, 2023

RUBY J. KRAJICK

Clerk of Court

BY:



Deputy Clerk

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Southern District of New York

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ORDER ADOPTING REPORT AND RECOMMENDATION

for [15] Report and Recommendations. The Court therefore adopts the R&R in its entirety as the opinion of the Court. The habeas corpus petition is DENIED. Finding that Mr. Holmes has not demonstrated a denial of a constitutional

right, a certificate of appealability is DENIED. The Court further certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and in forma pauperis status is therefore denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

The Clerk of Court is respectfully requested to close this case. SO ORDERED.

(Signed by Judge Mary Kay Vyskocil on 8/8/2023) (tg) Transmission to Orders and Judgments Clerk for processing.

1:22-cv-06388-MKV-SN Notice has been electronically mailed to:

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d63483316553c287cb7efdeb1c4eb0ce2c021bc95cd89c48d]]

Appendix C

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U.S. District Court
Southern District of New York

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Case Number: 1:22-cv-06388-MKV-SN <https://ecf.nysd.uscourts.gov/cgi-bin/DktRpt.pl?583800>

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Docket Text:

ORDER REFERRING CASE TO MAGISTRATE

JUDGE. Order that case be referred to the Clerk of Court for assignment to a Magistrate Judge for Habeas Corpus. Referred to Magistrate Judge Sarah Netburn. (Signed by Judge Mary Kay Vyskocil on 1/17/2023) (tg)

1:22-cv-06388-MKV-SN Notice has been electronically mailed to:

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Arlene.roces@ag.ny.gov

Samuel Zachary Goldfine goldfines@dany.nyc.gov, kresss@dany.nyc.gov

NEW YORK COUNTY DISTRICT ATTORNEYS OFFICE-GENERIC fedhabeas@dany.nyc.gov

1:22-cv-06388-MKV-SN Notice has been delivered by other means to:

Marvin Holmes

DIN: 08A4337

Green Haven Correctional Facility

594 Route 216

Stormville, NY 12582

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: n/a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVIN HOLMES,

Plaintiff,

-against-

MARK MILLER, *Superintendent, Green
Haven Correctional Facility,*

Defendant.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 1/17/2023

1:22-cv-06388-MKV

**ORDER OF REFERENCE TO A
MAGISTRATE JUDGE**

The above entitled action is referred to the designated Magistrate Judge for the following purpose(s):

General Pretrial (includes scheduling, discovery, non-dispositive pretrial motions, and settlement)

Specific Non-Dispositive Motion/Dispute:

If referral is for discovery disputes when the District Judge is unavailable, the time period of the referral: _____

Settlement

Inquest After Default/Damages Hearing

Consent under 28 U.S.C. § 636(c) for all purposes (including trial)

Consent under 28 U.S.C. § 636(c) for limited purpose (e.g. dispositive motion, preliminary injunction)
Purpose: _____

Habeas Corpus

Social Security

Dispositive Motion (i.e. motion requiring Report and Recommendation)
Particular Motion: _____

All such motions: _____

SO ORDERED:

DATED: January 17, 2023
New York, New York

Mary Kay Vyskocil

Mary Kay Vyskocil
United States District Judge

EXHIBIT B

EXHIBIT C

2022 WL 3030494

Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Marvin HOLMES, Petitioner,

v.

Mark MILLER, Respondent.

22-CV-6388 (LTS)

|

Signed July 29, 2022

Attorneys and Law Firms

Marvin Holmes, Stormville, NY, Pro Se.

ORDER

LAURA TAYLOR SWAIN, Chief United States District Judge:

*1 Petitioner, who is currently incarcerated at Green Haven Correctional Facility, brings this *pro se habeas corpus* petition challenging his 2008 conviction in the New York Supreme Court, New York County. By order dated July 27, 2022, the Court granted Petitioner's request to proceed *in forma pauperis* (IFP). The Court directs Petitioner to file a declaration within 60 days of the date of this order showing cause why this application should not be denied as time barred.

DISCUSSION

A. Applicable Statute of Limitations

Petitioner's application may be time barred. A prisoner seeking *habeas* relief under § 2254 must generally file a petition within one year from the latest of four benchmark dates: (1) when the judgment of conviction becomes final; (2) when a government-created impediment to making such a motion is removed; (3) when the constitutional right asserted is initially recognized by the Supreme Court, if it has been made retroactively available to cases on collateral review; or (4) when the facts supporting the claim(s) could have been discovered through the exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1)-(2).

Petitioner was convicted on June 18, 2008, in the New York Supreme Court, New York County.¹ Court records indicate that on March 3, 2011, the New York Supreme Court Appellate Division, First Department, affirmed the conviction, *People v. Holmes*, 82 A.D.3d 441 (1st Dep't 2011), and the New York Court of Appeals denied leave to appeal on May 26, 2011, 16 N.Y.3d 895. Petitioner's conviction consequently became final on or about August 26, 2011, following "the expiration of [the] 90-day period of time to petition for *certiorari* in the Supreme Court of the United States." *Warren v. Garvin*, 219 F.3d 111, 112 (2d Cir. 2000).² Petitioner placed this petition in the prison mail collection box on January 10, 2022, more than 10 years after the judgment of conviction became final.³

Under the federal *habeas* statute, when postconviction motions are filed before the expiration of the statute of limitations, those motions and related state-court proceedings may toll the statute of limitations. *See* 28 U.S.C. § 2244(d)(2). Postconviction motions filed after the limitations period expires, however, do not start the limitations period anew. "[P]roper calculation of Section 2244(d)(2)'s tolling provision excludes time during which properly filed state relief applications are pending but does not reset the date from which the one-year statute of limitations begins to run." *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). Section 2244(d)(2) applies only if a petitioner's postconviction motion was pending within the one-year limitations period.

*2 Here, Petitioner alleges that he filed a postconviction motion, under New York Criminal Procedure Law § 440.10, in the New York State courts on November 5, 2014, more than 3 years after his conviction became final. The trial court denied that motion on August 15, 2018. The Appellate Division granted Petitioner leave to appeal, but ultimately affirmed the trial court decision. *People v. Holmes*, 202 A.D.3d 519 (1st Dep't Feb. 10, 2022). The Court of Appeals denied leave to appeal on April 19, 2022. 38 N.Y.3d 1008. (*Id.* ¶¶ 15-20.) Because Petitioner's postconviction proceedings in the New York state courts were commenced after the statute of limitations for a *habeas* petition had expired, they do not appear to have tolled the limitations period. *See* 28 U.S.C. § 2244(d)(2). In response to a prompt on the Court's *habeas corpus* form petition to address any untimeliness in the petition, Petitioner simply asserted, "This does not apply to this petition." (*Id.* ¶ 28.)

B. Leave to File Declaration

The Court directs Petitioner to file a declaration within 60 days of the date of this order stating why this application should not be dismissed as time barred. Petitioner should include in his declaration a listing of the following: (1) the dates on which he filed each of his postconviction collateral state court applications and motions in which he challenged this conviction, including any application for error coram nobis relief, all motions under N.Y. Crim. Proc. Law § 440, and any other postconviction collateral applications and motions; (2) the dates on which the state courts issued decisions as to any of those applications or motions; (3) the dates on which he filed any appeals or applications for leave to appeal from those decisions; (4) the dates on which the state courts issued decisions on those appeals or applications; and (5) the dates on which he received notice of any state court decisions on those applications and appeals.

Petitioner also should allege any facts showing that he has been pursuing his rights diligently and that some extraordinary circumstance prevented him from timely submitting this petition. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (holding that one-year limitations period under § 2244(d) for *habeas corpus* petitions under 28 U.S.C. § 2254 is subject to equitable tolling in appropriate cases).

CONCLUSION

Petitioner is directed to file a declaration within 60 days of the date of this order showing why the petition should not be dismissed as time barred. A declaration form is attached to this order. If Petitioner timely files a declaration, the Court will review it, and if further pleadings are warranted, will order the Respondent to answer. If Petitioner fails to comply with this order within the time allowed, and cannot show good cause to excuse such failure, or if the declaration is insufficient to demonstrate that the petition was timely filed, the Court will deny the petition as time barred. No answer shall be required at this time.

Because Petitioner has not at this time made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore IFP status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Attachment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Write the first and last name of each plaintiff or petitioner.

Case No. _____ CV _____

-against-

Write the first and last name of each defendant or respondent.

DECLARATION

Briefly explain above the purpose of the declaration, for example, "in Opposition to Defendant's Motion for Summary Judgment," or "in Response to Order to Show Cause."

I, _____, declare under penalty of perjury that the following facts are true and correct:

In the space below, describe any facts that are relevant to the motion or that respond to a court order. You may also refer to and attach any relevant documents.

Rev. 10/3/16

All Citations

Not Reported in Fed. Supp., 2022 WL 3030494

Attach additional pages and documents if necessary.

Executed on (date)	Signature		
Name	Prison Identification # (if incarcerated)		
Address	City	State	Zip Code
Telephone Number (if available)	E-mail Address (if available)		

Page 2

Footnotes

1 In this petition, Petitioner asserts that he was convicted on June 18, 2018. The date appears to be a typographical error.
(ECF 2 ¶ 2.)

2 Petitioner did not petition for a writ of *certiorari* in the Supreme Court. (*Id.* ¶ 12.)

3 The Court received the petition on July 26, 2022. The cause of the delay between the date on the petition and the date of its receipt is not clear.

End of Document

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Appendix A

EXHIBIT A