

APPENDIX A

ORDER OF THE 11TH CIRCUIT COURT OF APPEALS

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11570

Non-Argument Calendar

ROLANDAS MILINAVICIUS,

Petitioner-Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF
CORRECTIONS,

Respondent-Appellee,

ATTORNEY GENERAL, STATE OF GEORGIA,

Respondent.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-01815-MHC

Before JILL PRYOR, BRANCH and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Rolandas Milinavicius, a Georgia prisoner, appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition as time-barred. This court granted a certificate of appealability ("COA") on the issue of "[w]hether the district court erred by granting the motion to dismiss Milinavicius's petition as time-barred because a petitioner's inability to speak English fluently cannot serve as a basis for equitable tolling of the AEDPA's one-year filing deadline." In addition to this issue, Milinavicius argues that the district court erred in failing to hold an evidentiary hearing on the issue of equitable tolling and that this inquiry is inherent in the COA. Having read the parties' briefs and reviewed the record, we affirm the district court's order dismissing Milinavicius's habeas petition.

I.

We review *de novo* the district court's dismissal of a § 2254 petition as untimely. *See Damren v. Florida*, 776 F.3d 816, 820 (11th Cir. 2015). We also review *de novo* the district court's decision on equitable tolling. *San Martin v. McNeil*, 633 F.3d 1257, 1265 (11th

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Cir. 2011). However, a district court's determinations as to the relevant facts are reviewed for clear error, and we will affirm the findings of fact unless the record lacks substantial evidence to support those findings. *Id.* The habeas petitioner bears the burden of proving the circumstances that justify the application of equitable tolling. *Id.* at 1268

II.

To be entitled to equitable tolling, a petitioner must show that: (1) he pursued his rights diligently; and (2) some "extraordinary circumstance" prevented a timely filing. *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 2562 (2010). Equitable tolling is an extraordinary remedy that is limited to "rare and exceptional circumstances." *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009) (citation omitted). For equitable-tolling purposes, only reasonable diligence is required, not "maximum feasible diligence." *Holland*, 560 U.S. at 653, 130 S. Ct. at 2565. To show extraordinary circumstances, a defendant must show a "causal connection between the alleged extraordinary circumstances and the late filing of the petition." *San Martin*, 633 F.3d at 1267.

In *United States v. Montano*, we stated that difficulty with the English language alone does not amount to an extraordinary circumstance warranting equitable tolling. 398 F.3d 1276, 1280 n.5 (11th Cir. 2005) (citing *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002)). The petitioner in *Montano* claimed that his language difficulties prevented him from discovering a challenge to his conviction on his own, which his attorney allegedly had overlooked. *Id.*

We held that the petitioner “ha[d] not shown such ‘extraordinary circumstances’ as to justify equitable tolling of the one-year filing requirement in § 2255.” *Id.* (citation omitted).

In a § 2254 proceeding, the burden is on the petitioner to demonstrate the need for an evidentiary hearing. *Chavez v. Sec’y Fla. Dep’t of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011). “In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.” *Id.* (quotation marks omitted). The district court is not required to hold an evidentiary hearing on the issue of equitable tolling, and we review the district court’s denial of an evidentiary hearing on a § 2254 petition for an abuse of discretion. *Pugh v. Smith*, 465 F.3d 1295, 1298, 1300 (11th Cir. 2006).

III.

Initially, we conclude that the issue of whether the district court abused its discretion by not granting an evidentiary hearing is not properly before us for review. “[A]ppellate review is limited to the issues specified in the COA.” *Murray v. United States*, 145 F.3d 1249, 1250-51 (11th Cir. 1998). The sole issue outlined in the COA was “[w]hether the district court erred by granting the motion to dismiss Milinavicius’s petition as time-barred because a petitioner’s inability to speak English fluently cannot serve as a basis for equitable tolling of the AEDPA’s one-year filing deadline.” The COA does not mention any issue regarding whether the district court

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abused its discretion by not conducting an evidentiary hearing before dismissing Milinavicius's habeas petition.

Nevertheless, even assuming that the evidentiary hearing issue is implicit in the language of the COA, Milinavicius did not request an evidentiary hearing in the district court concerning his difficulties with the English language and the impact this language barrier had on his pursuit of habeas relief. As such, Milinavicius failed to meet his burden to demonstrate the need for an evidentiary hearing on the issue, and we conclude that the district court did not abuse its discretion by failing to conduct an evidentiary hearing before dismissing the habeas petition as time-barred. See *Chavez*, 647 F.3d at 1060.

Further, the record demonstrates that the district court did not err in concluding that Milinavicius was not entitled to equitable tolling and, therefore, dismissing his petition as untimely. As both parties contend, it is not apparent from the district court's order that it categorically excluded consideration of language difficulties when it determined that his English language deficiency did not satisfy the extraordinary circumstances prong of the equitable tolling standard. *Montano* did not say that a petitioner with a lack of ability to read, write, and understand the English language is never entitled to equitable tolling. See *Montano* at 1280 n.5. Rather, we stated that a petitioner's proficiency with the English language is one, among other considerations, a district court examines when determining the application of equitable tolling.

We conclude, from the record, that Milinavicius cannot show a causal connection between the untimely filing of his habeas petition and his alleged English language barrier. The record shows that Milinavicius admitted in his own filings that he had access to an inmate who assisted him with the draft of his habeas petition during the relevant one-year period. He also acknowledged in his objections to the report and recommendation that he had procured legal assistance from a Lithuanian organization during the relevant one-year period. Although factors prevented the organization from assisting him further, and he was transferred from the institution where the inmate was assisting him, Milinavicius cannot meet his burden to show that he was not capable of completing his habeas petition in a timely manner because of his language deficiency. To the contrary, he was able to secure assistance, despite his language deficiency, during the relevant one-year period. Thus, Milinavicius cannot meet his burden to show that he was entitled to equitable tolling due to his alleged English language deficiency.

Accordingly, based on the aforementioned reasons, we affirm the district court's order dismissing Milinavicius's habeas petition as untimely.

AFFIRMED.

APPENDIX B

BRIEF OF APPELLANT