

CLD-050

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **23-2411**

KEITH VERNON DAVIS, Appellant

VS.

SUPERINTENDENT HOUTZDALE SCI

(W.D. Pa. Civ. No. 3:22-cv-00152)

Present: KRAUSE, FREEMAN, and SCIRICA, Circuit Judges

Submitted is Appellant's motion for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied. Jurists of reason would not dispute the District Court's determination that Appellant's petition is time-barred. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Appellant has not shown that his petition would be rendered timely through the application of statutory tolling, see 28 U.S.C. § 2244(d)(2); Swartz v. Myers, 204 F.3d 417, 424 (3d Cir. 2000); Douglas v. Horn, 359 F.3d 257, 262 (3d Cir. 2004), or equitable tolling, see Holland v. Florida, 560 U.S. 631, 649 (2010); Ross v. Varano, 712 F.3d 784, 800 (3d Cir. 2013). Nor has he shown that the limitations period should be excused based on actual innocence. See McQuiggin v. Perkins, 569 U.S. 383, 386 (2013); Schlup v. Delo, 513 U.S. 298, 329 (1995).

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: January 19, 2024
CJG/cc: Keith Vernon Davis
Warren L. Crilly, III, Esq.



A True Copy:

Patricia S. Dodszeit

Patricia S. Dodszeit, Clerk
Certified Order Issued in Lieu of Mandate

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KEITH VERNON DAVIS,

Petitioner,

v.

SCOTT KLINEFELTER, WARDEN, SCI
HOUTZDALE,

Respondent.

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Case No. 3:22-cv-152

JUDGE KIM R. GIBSON

MEMORANDUM ORDER

This matter is before Magistrate Judge Keith A. Pesto for proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636, and Local Civil Rule 72.

On September 7, 2022, pro se petitioner Keith Vernon Davis ("Petitioner") filed a petition for a writ of habeas corpus. (ECF No. 6). On November 30, 2023, respondent Scott Klinefelter filed a motion to dismiss this petition. (ECF No. 14). On February 10, 2023, Magistrate Judge Pesto entered a Report & Recommendation ("R&R") recommending that the petition be dismissed for untimeliness. (ECF No. 23). The Magistrate Judge also wrote that, "[although] I would not grant one . . . the Court may [decide to] consider petitioner entitled to a certificate of appealability" due to the fact that

jurists of reason from California to Ohio have granted not just tolling but prospective tolling of the limitations period (either directly or by prospectively granting amendment of a petition after the limitations period expires) based on the potential for disruption caused by Covid, with any evaluation of timeliness made as part of the evaluation of a claim on the merits.

(*Id.* at 5) (citing *Pickens v. Shoop*, No. 1:19-CV-558, 2020 WL 3128536, at *3 (S.D. Ohio June 12, 2020);

Brown v. Davis, 482 F. Supp. 3d 1049 (E.D. Cal. 2020); *Burns v. Shinn*, No. 21-CV-1173, 2022 WL

1540091 (D. Ariz. May 16, 2022)). The Court interprets the above as a recommendation that the Court decline to issue a certificate of appealability.

Petitioner filed timely written objections to the R&R on February 21, 2023. (ECF No. 24). The Court has reviewed these objections and finds them meritless. It also declines to issue a certificate of appealability, despite the propriety of equitable tolling due to COVID-19 disruptions under certain circumstances. It is the “petitioner [who] must establish that he was pursuing his rights diligently *and* that the COVID-19 pandemic specifically prevented him from filing his motion.” *United States v. Henry*, No. 2:20-CV-1821, 2020 WL 7332657, at *4 (W.D. Pa. Dec. 14, 2020) (emphasis original). Even assuming arguendo that Petitioner had pursued his rights diligently, the Court would not apply equitable tolling because Petitioner failed to establish that the pandemic-related law library restrictions *specifically* prevented him from filing his petition in a timely manner. Petitioner faults his “mental, educational, intellectual, and learning disabilities” as the causes of his untimeliness in filing the habeas corpus petition. (ECF No. 24 at 3). He also attributes his untimeliness to “State . . . interfere[nce] with the preparation of Petitioner’s federal habeas corpus petition[.]” which he identifies as the cause of his placement in disciplinary segregation during a portion of the limitations period. (*Id.* at 4). Regarding this disciplinary segregation, Petitioner claims that he “could have been preparing a federal habeas corpus petition” during that period “if he had access to trained legal assistance at his prison institution[.]” (ECF No. 24 at 3–4). These statements indicate that Petitioner primarily attributes his untimeliness to disabilities and lack of competent legal support, rather than the pandemic limitations on law library access.

Indeed, the facts alleged by Petitioner indicate that he had substantial access to the law library during the limitations period, notwithstanding the pandemic limitations. He alleges that the Department of Corrections implemented pandemic quarantine measures at SCI Houtzdale that restricted law library access to one visit every two weeks from June 2020 until June 2021. (ECF No. 22 at 3–4). He further alleges that, “[a]t some point several months thereafter, access to the prison law library was increased to permit . . . a single one-hour law library period every five days.” (*Id.* at 4). Supposing that this modification occurred in the early fall of 2021—say, October 1, 2021—Petitioner would have still had about 6 hours of law library access per month over the next 8 months leading up to the expiration of the limitations period on June 21, 2022. Adding to this 48-hour sum the 3 hours of law library access that Petitioner would have had under the initial restriction between August 16, 2021, and October 1, 2021, this places a rough estimate of law library access during the limitations period at around 51 hours. Although the Court makes no finding as to whether this number of hours is generally sufficient for a pro se litigant to draft and file a habeas corpus petition, it does find that this information casts additional doubt on the existence of a sufficient “nexus” between the pandemic restrictions and Petitioner’s failure to timely file his petition. *Henry*, 2020 WL 7332657, at *4.

No reasonable jurist could conclude from these facts, in light of the “exacting standards” applied to equitable tolling claims, that Petitioner established both that he diligently pursued his rights and that the pandemic specifically prevented him from filing his petition for a writ of habeas corpus. *Pelzer v. Mahally*, 388 F. Supp. 3d 366, 375 (M.D. Pa. 2019). Accordingly, the following order is entered:

NOW, this 19th day of July, 2023, **IT IS HEREBY ORDERED** that Magistrate Judge Pesto's R&R, (ECF No. 23), is **ADOPTED** as the Opinion of the Court for its reasoning and conclusion.

IT IS FURTHER ORDERED that respondent Scott Klinefelter's motion to dismiss the petition for a writ of habeas corpus at ECF No. 6, (ECF No. 14), is **GRANTED**.

IT IS FURTHER ORDERED that the petition for a writ of habeas corpus, (ECF No. 6), is **DENIED WITHOUT A CERTIFICATE OF APPEALABILITY**. The Clerk of Court is directed to mark this case as closed.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Kim R. Gibson", written over a horizontal line.

KIM R. GIBSON
UNITED STATES DISTRICT JUDGE

Notice by U.S. mail to:

Keith Vernon Davis
NF9296
SCI Houtzdale
P.O. Box 1000
208 Institution Drive
Houtzdale, PA 16698-1000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2411

KEITH VERNON DAVIS,
Appellant

v.

SUPERINTENDENT HOUTZDALE SCI

(WDPA No. 3-22-cv-00152)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE,
RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-
REEVES, CHUNG, and SCIRICA,¹ Circuit Judges

The petition for rehearing filed by Appellant Keith Davis in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

¹ Judge Scirica's vote is limited to panel rehearing.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: April 1, 2024

CJG/cc: Keith Vernon Davis
Warren L. Crilly, III, Esq.

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