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FILED
United States Court of Appeals
Tenth Circuit

August 1, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSEPH BLEA,

Petitioner - Appellant,

v.

RICHARD MARTINEZ; ATTORNEY GENERAL OF THE STATE OF NEW MEXICO,

Respondents - Appellees.

No. 23-2191
(D.C. No. 2:20-CV-00986-JCH-JHR)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH**, **EID**, and **FEDERICO**, Circuit Judges.

New Mexico prisoner Joseph Blea, proceeding pro se[1] seeks a certificate of appealability (COA) to appeal the district court's denial of his petition for

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] "Because [Mr. Blea] appeared pro se, we liberally construe his pleadings. Nevertheless, he . . . . must comply with the same rules of procedure as other litigants." *Requena v. Roberts*, 893 F.3d 1195, 1205 (10th Cir. 2018) (internal citations omitted). And in the course of our review, "[w]e will not act as his counsel, searching the record for arguments he could have, but did not, make." *Id.*

Appendix A

habeas corpus under 28 U.S.C. § 2254. We deny a COA and dismiss this matter.

BACKGROUND

A New Mexico jury found Mr. Blea guilty of two first-degree felonies—criminal sexual penetration and kidnapping. Mr. Blea committed the crimes in 1988. At that time, New Mexico's statute of limitations for first-degree felonies was fifteen years. But in 1997, the New Mexico legislature amended N.M. Stat. Ann. § 30-1-8 to provide: "[F]or a capital felony or a first[-]degree violent felony, no limitation period shall exist and prosecution for these crimes may commence at any time after the occurrence of the crime."

State prosecutors charged, tried, and convicted Mr. Blea in 2015, more than fifteen years after he committed the crimes. The New Mexico district and appellate courts upheld the conviction on direct appeal and on state collateral review.

Mr. Blea filed a § 2254 petition in 2020, arguing, as he had throughout his state appeals, that he had a right to the original fifteen-year limitations period that expired prior to his prosecution and that allowing his prosecution under the 1997 amendment violated the *Ex Post Facto* Clause of the Constitution. He later sought to amend his § 2254 petition to add a claim that his trial defense counsel was constitutionally ineffective for failing to adequately raise this argument.

A magistrate judge recommended the district court deny the petition. The magistrate judge concluded Mr. Blea had no vested right to the shelter under the fifteen-year duration of the original statute of limitations and there was no violation of the *Ex Post Facto* Clause when the state applied the expanded limitations period to his prosecution.

Mr. Blea filed timely objections. The district court overruled the objections, adopted the magistrate judge's recommendations, denied the § 2254 petition, denied leave to amend as futile, and denied a COA. The district court concluded Mr. Blea failed to show how the state court acted contrary to or unreasonably applied clearly established federal law when it rejected his statute-of-limitations and *Ex Post Facto* Clause arguments. This COA application followed.

DISCUSSION

To appeal the denial of his § 2254 petition, Mr. Blea must obtain a COA by "showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). Our consideration of a COA request incorporates the "deferential treatment of state court decisions" in the Antiterrorism and Effective Death Penalty Act (AEDPA). *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). Under AEDPA,

to obtain habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

The Supreme Court has held "a law enacted *after* expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution." *Stogner v. California*, 539 U.S. 607, 632–33 (2003) (emphasis added). But "to hold that such a law is *ex post facto* does not prevent the State from extending time limits for . . . prosecutions not yet time barred." *Id.* at 632; *see also United States v. Taliaferro*, 979 F.2d 1399, 1402 (10th Cir. 1992) ("[T]he application of an extended statute of limitations to offenses occurring prior to the legislative extension, where the prior and shorter statute of limitations has not run as of the date of such extension, does not violate the [*E*]*x* [*P*]*ost* [*F*]*acto* [C]lause.").

In Mr. Blea's case, the New Mexico legislature extended the relevant statute of limitations in 1997, when the fifteen-year statute of limitations had not yet run. So none of the arguments in Mr. Blea's COA application show a constitutional violation from its extension. *See Stogner*, 539 U.S. at 632–33.

Mr. Blea argues at length that his case is distinguishable from *State v. Morales*, 236 P.3d 24, 26 (N.M. 2010), in which the New Mexico Supreme

Court held the 1997 amended statute of limitations applied to "capital felonies and first-degree violent felonies committed after July 1, 1982." *See* Aplt. Opening Br. & Appl. for COA at 6–14, 17–21, 25–26. He strains to distinguish *Morales* because its holding defeats his claim. But "a state court's interpretation of state law, . . ., binds a federal court sitting in habeas corpus." *Hawes v. Pacheco*, 7 F.4th 1252, 1264 (10th Cir. 2021). So "to the extent [Mr. Blea] argues the state court erroneously interpreted and applied state law, that does not warrant [federal] habeas relief." *Id.* (internal quotation marks and brackets omitted).

Also unavailing are Mr. Blea's arguments that his prosecution was unconstitutional based on (a) the report of his crime to law enforcement in 1989 or (b) the passage in 1987 of N.M. Stat. Ann. § 30-1-9.1 ("The applicable time period for commencing prosecution . . . shall not commence to run for an alleged violation of [the sexual penetration statute] until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first."). The Supreme Court and this court have held the extension of the statute of limitations does not violate the Constitution. *See Stogner*, 539 U.S. at 632–33; *Taliaferro*, 979 F.2d at 1402. So reasonable jurists could not debate the district court's dismissal of Mr. Blea's § 2254 claims.

We also reject Mr. Blea's argument that the district court erred in ruling without first holding an evidentiary hearing. Because we would review a

district court's denial of an evidentiary hearing for abuse of discretion during a merits appeal, the Supreme Court has accepted a formulation of "the COA question" as "whether a reasonable jurist could conclude that the District Court abused its discretion." *Buck v. Davis*, 580 U.S. 100, 123 (2017). Where, as here, a court can resolve a habeas claim on the existing record, it does not abuse its discretion when it denies an evidentiary hearing. *Torres v. Mullin*, 317 F.3d 1145, 1161 (10th Cir. 2003). The district court was able to resolve Mr. Blea's claims on the record, and he has not shown what evidence he would have presented at a hearing that would have made a difference. A reasonable jurist could not conclude the district court abused its discretion in not holding an evidentiary hearing.

Finally, Mr. Blea claims his trial defense counsel was ineffective for failing to raise and argue that the statute of limitations barred his prosecution. We reject this argument because a counsel cannot be ineffective for failing to raise a claim that lacks merit. *See Fairchild v. Trammel*, 784 F.3d 702, 724 (10th Cir. 2015).

CONCLUSION

We deny a COA and dismiss this matter.

Entered for the Court

Richard E.N. Federico
Circuit Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH BLEA,

Petitioner,

v. No. 2:20-cv-00986-JCH-JHR

RICHARD MARTINEZ and
ATTORNEY GENERAL OF THE
STATE OF NEW MEXICO,

Respondents.

ORDER ADOPTING MAGISTRATE JUDGE'S

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

This matter comes before the Court on Petitioner Joseph Blea's *Submission of Objections to Proposed Findings and Recommended Disposition by Magistrate Judge Jerry H. Ritter along with Petitioner's Request that the Honorable Court Accept Amended § 2254 Petition for Federal Habeas Relief* (ECF No. 29). The Honorable Jerry H. Ritter filed his *Proposed Findings and Recommended Decision Denying Motion to Amend Habeas Corpus Petition and Dismissing Case* ("PFRD") (ECF No. 28) on March 17, 2023. He recommends that the motion to amend be denied as futile, Mr. Blea's § 2254 petition be dismissed, and all pending motions be terminated as moot.

After Judge Ritter notified the parties of the 14-day deadline for objections in the PFRD, (PRFD 7, ECF No. 28), Mr. Blea filed his objections on April 10, 2023, asserting that they are timely because he was served on March 22, 2023, and he placed his written objections into the mail system on April 5, 2023. (Pet'r's Obj. 1, ECF No. 29.) On April 21, 2023, Respondents filed a response to the objections (ECF No. 30), and do not dispute that the objections were timely filed. Having conducted a de novo review of the Objections, the Court overrules them, adopts the PFRD in its entirety, denies Mr. Blea's motion to amend, and dismisses the case with prejudice.

Appendix B

I. BACKGROUND

In 2015, Petitioner Joseph Blea was convicted by a jury of two first-degree felonies that occurred on November 2, 1988: criminal sexual penetration (force/coercion) in violation of N.M. Stat. Ann. § 30-9-11 and kidnapping in violation of N.M. Stat. Ann. § 30-4-1. (*See* Judgment, ECF No. 11-1 at 1, 184-85.) At the time the crimes occurred, the limitation period for first-degree felonies was 15 years. *See State v. Morales*, 2010-NMSC-026, ¶ 7, 148 N.M. 305 (citing 1979 N.M. Laws, Ch. 5, § 1). Effective 1997, the New Mexico legislature amended N.M. Stat. Ann. § 30-1-8 to provide that "for a capital felony or a first-degree violent felony, no limitation period shall exist and prosecution for these crimes may commence at any time after the occurrence of the crime," effective on July 1, 1997. *See* 1997 N.M. Laws, ch. 157 (H.B. 720) (hereinafter the "1997 Amendment").

In his § 2254 petition and proposed amended petition, Mr. Blea argues that his prosecution was barred by the 15-year statute of limitations in place at the time the crime occurred. He asserts that the 1987 Tolling Provision precludes retroactive application of the 1997 Amendment, or alternatively, that his rights vested and precluded retroactive application of the 1997 Amendment. (*See* Proposed Petition, ECF No. 25-1 at 6 of 58.) On August 11, 2022, Mr. Blea filed a *Motion to Amend 28 U.S.C. Section 2254 Habeas Corpus Petition* (ECF No. 25), in which he clarified:

> [P]etitioner withdraws all claims from his previously filed § 2254 federal habeas corpus petition (Doc. 7) and submits an amended § 2254 habeas corpus petition that addresses only those claims that are part and parcel to the 'applicability of the 1997 Amendment to § 30-1-8, as concerns the instant case. Therein, petitioner addresses IAC (both error and prejudice, vested/accrued rights (or not), and the substantive law of the 1987 Tolling Provision (NMSA 1978, § 30-1-9.1 (1987)) (offenses that can be properly tolled and those that cannot be properly tolled).

(Pet'r's Mot. 8, ECF No. 25) (underlining in original). Following full briefing on the motion, Judge Ritter entered his PFRD recommending that the motion to amend be denied and this matter be dismissed.

II. STANDARD

The Court makes a de novo determination of those portions of the PFRD to which Mr. Blea objected. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations." 28 U.S.C. § 636(b)(1). De novo review requires the district judge to consider relevant evidence of record and not merely to review the magistrate judge's recommendation. *In re Griego*, 64 F.3d 584 (10th Cir. 1995). A "party's objections to the magistrate judge's [PFRD] must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Prop., With Buildings, Appurtenances, Improvements, & Contents*, 73 F.3d 1057, 1060 (10th Cir. 1996). Thus, failure to make a timely and specific objection to a PFRD waives de novo review.

A habeas petition may be amended "as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. When a party moves to amend, a court should freely give leave to amend when justice so requires. Fed. R. Civ. P. 15(a)(2). Leave sought must be freely given in the absence of any justifiable reason for the denial of the motion, such as futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A proposed amendment is futile if the petition, as amended, would be subject to dismissal. *Bradley v. Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004).

III. ANALYSIS

A § 2254 habeas corpus petition shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Article I, section 10, of the United States Constitution prohibits a State from passing any "ex post facto

Law." U.S. Const., Art. I, § 10, cl. 1. A statute that deprives a defendant of any defense that was available by law at the time when the act was committed violates the *Ex Post Facto* Clause. *Dobbert v. Florida*, 432 U.S. 282, 292 (1977) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)). A "law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution." *Stogner v. California*, 539 U.S. 607, 632-33 (2003). To "hold that such a law is *ex post facto* does not prevent the State from extending time limits for the prosecution of future offenses, or for prosecutions not yet time barred." *Id.* at 632.

In his first objection, Mr. Blea argues that the Magistrate Judge erred in recommending the denial of his proposed amended § 2254 petition and dismissing his case because "he is entitled to the statute of limitations defense that vested when the cause of action accrued." (Pet'r's Obj. 4, ECF No. 29.) It is undisputed that, at the time the crimes occurred and were reported, the statute of limitations for the crimes was 15 years. At that time, the deadline for prosecuting such crimes would have been in 2003, well before the prosecution that commenced in 2010. Before the 2003 expiration date, however, in 1997 the New Mexico Legislature abolished the 15-year limitations period for all capital and first-degree felonies. Mr. Blea argues that retroactive application of the 1997 amendment extending the statute of limitations for his crimes was impermissible where the State's right of action and any liabilities attached thereto vested and accrued prior to the effective date of the amendment. According to Mr. Blea, a cause of action accrues when the authorities acquire knowledge that an offense has been committed, and that upon that accrual, the statute of limitations becomes specifically tied to the right and limits both the right and remedy. In this manner, he attempts to distinguish the case of *State v. Morales*, 2010-NMSC-026, 148 N.M. 305, upon which Judge Ritter relied.

Mr. Blea argues that in *Morales*, law enforcement did not become aware of the offenses until after July 1, 1997, so the State's right of action never vested or accrued before the 1997 amendment. In contrast, Mr. Blea asserts that in his case the crime was immediately reported to law enforcement, so the pre-amendment 15-year statute of limitations vested, and the retroactive application of the longer statute of limitations violates the *Ex Post Facto* clause. The Court, however, finds Judge Ritter's analysis sound and disagrees with Mr. Blea that the reasoning of *Morales* is limited to crimes that were not reported to law enforcement until after the expiration of the statute of limitations.

As an initial matter, it is not clear from *Morales* when the crime was reported to law enforcement. Nevertheless, that fact does not affect the New Mexico Supreme Court's holding that the New Mexico Legislature intended the 1997 amendment to apply retroactively to unexpired criminal conduct committed before the amendment's effective date of July 1, 1997. *Morales*, 2010-NMSC-026, ¶¶ 6, 20. Consequently, first-degree crimes committed in New Mexico after July 1, 1982, as is the case here, "are not time-barred." *Id.*

The New Mexico Supreme Court's conclusion in *Morales* does not violate the *Ex Post Facto* Clause. Application of the 1997 Amendments to crimes occurring after July 1, 1982, do not revive previously time-barred prosecutions because, at the time of the effective date of the 1997 Amendments, crimes that took place after July 1, 1982, were not yet time barred. *See Stogner*, 539 U.S. at 632-33 (suggesting in dicta that extensions of unexpired statute of limitations do not violate Ex Post Facto Clause); *United States v. Glenn*, No. 21-5010, 2021 WL 5873144, at *2 (10th Cir. Dec. 13, 2021) ("In *United States v. Taliaferro*, 979 F.2d 1399, 1402 (10th Cir. 1992), we held that 'the application of an extended statute of limitations to offenses occurring prior to the legislative extension, where the prior and shorter statute of limitations has not run as of the date of

such extension, does not violate the *ex post facto* clause.' The Supreme Court's *Stogner* decision expressly avoided opining on this scenario.... *Taliaferro* therefore remains good law."); *Taliaferro*, 979 F.2d at 1403 ("Since the original statute of limitations had not run on any of Taliaferro's statutory violations and Congress has the authority to extend a statute of limitations where the original time period has not run, 18 U.S.C. § 3293 does not violate the *ex post facto* clause of the Constitution."). The Court therefore agrees with Judge Ritter's analysis that "where a defendant such as Blea was never free from prosecution, the extension of the time limit does not increase the punishment for the original crimes and is not ex post facto," (PFRD 7, ECF No. 28). Accordingly, the Court overrules Mr. Blea's first objection.

Next, Mr. Blea contends that his case is governed by the 1987 Tolling Provision, N.M. Stat. Ann. § 30-1-9.1, which is "substantive law that cannot be altered or impaired," and which precludes retroactive application of the 1997 Amendments. (Pet'r's Obj. 25, ECF No. 29.) He argues Judge Ritter erred in not addressing this argument. (*Id.* at 25.)

Section 30-1-9.1, enacted in 1987, provides that the "applicable time period for commencing prosecution pursuant to Section 30-1-8 NMSA 1978 shall not commence to run for an alleged violation of Section 30-6-1, 30-9-11 or 30-9-13 NMSA 1978 until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first." N.M. Stat. Ann. § 30-1-9.1. This Tolling Provision does not preclude application of the 1997 Amendment to this case. Here, Mr. Blea asserts that the violation was reported to law enforcement immediately, so for crimes subject to the Tolling Provision, the reporting date commenced the running of the clock for prosecution. But, as discussed *supra*, the New Mexico Legislature passed the 1997 Amendments before the 15-year statute of limitations expired for the crimes reported in 1988. Mr. Blea was thus at no time free from prosecution, and he had no vested right in the original

15-year limitations period. Consequently, prosecuting him for the first-degree crimes did not violate the *Ex Post Facto* Clause and his objection based on the Tolling Provision is overruled.

Mr. Blea also objects to the PFRD on the basis that Judge Ritter erred in concluding he did not include all his arguments and relevant facts in his habeas petition and that "defense counsel's failure to present petitioner's argument (failure to brief) constituted 'constructive denial of counsel.'" (*See* Pet'r's Obj. 3, ECF No. 29.) According to Mr. Blea, "[p]resentation of the relevant habeas facts would have asserted and supported a 'due process' violation and an ex post violation," and that the prosecution case's was never subjected to the adversarial process because the record was incomplete. (*Id.*)

Judge Ritter correctly concluded that Mr. Blea's claim for violation of the *Ex Post Facto* Clause was based on facts that were not disputed and a decision could be resolved on the record as a matter of law without the need for an evidentiary hearing. (PFRD 2, ECF No. 28.) As discussed *supra*, Mr. Blea's argument that his prosecution violated the *Ex Post Facto* Clause fails on its merits, and thus, the purported failure of his defense counsel to make this meritless argument does not constitute a denial of counsel. *Cf. Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (in order to establish an ineffective assistance claim, a movant must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense").

As for Mr. Blea's due process violation claim, Judge Ritter correctly construed Mr. Blea's proposed amended petition as asserting a due process claim based on the same arguments as supporting his *ex post facto* violation claim. (*See* PFRD 2, ECF No. 28.) As alleged in his proposed amended petition, and as limited in his motion to amend, Mr. Blea's due process claim is based on the failure of his defense counsel to brief his due process claim, to develop the relevant facts and

law in support, and thus to present a complete defense. (*See* Pet'r's Mot. to Amend 4, ECF No. 25.) Mr. Blea asserts that his due process claim arises from his defense counsel's failure to raise the issue of vested rights and the Tolling Provision, which according to him, preclude retroactive application of the 1997 Amendment. (*See* Pet'r's Proposed Am. Petition, ECF No. 25-1 at 7 of 58.) The record was sufficiently developed for both his *ex post facto* and due process claims, and those claims lacked merit as a matter of law. Consequently, Mr. Blea could not plausibly state a claim for ineffective assistance of counsel arising from the failure to raise those issues. To the extent that Mr. Blea attempted to assert other due process theories, the Court agrees with Judge Ritter that Mr. Blea's claim lacked factual or legal development to plausibly allege an alternative claim. (*See* PFRD 2 n.1, ECF No. 28.) The Court finds Judge Ritter correctly decided these issues and overrules this last objection.

IV. CERTIFICATE OF APPEALABILITY

In a habeas proceeding, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts. To be entitled to a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Reasonable jurists could not debate the Court's conclusions that Mr. Blea's claims of violations of the *Ex Post Facto* Clause and due process were meritless. The Court therefore will deny a certificate of appealability.

V. CONCLUSION

According to Federal Rule of Civil Procedure 72(b), the Court has conducted a de novo review of the record and all parts of the Magistrate Judge's PFRD to which the Petitioner has properly objected. After conducting this de novo review and having thoroughly considered the PFRD, objections, and response, the Court finds no reason in law or fact to depart from the Magistrate Judge's recommended disposition. Mr. Blea failed to state in his proposed § 2254 petition or in his objections how the state court's rejection of his statute-of-limitations and *ex post facto* arguments was contrary to or an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d). As Judge Ritter correctly concluded, Mr. Blea's "legal challenge to his conviction and sentence is flawed and mistaken, and so allowing him to amend his petition and go forward would be futile." (PFRD 7, ECF No. 28.)

For these reasons, it is ordered that:

1. Petitioner Joseph Blea's *Submission of Objections to Proposed Findings and Recommended Disposition by Magistrate Judge Jerry H. Ritter along with Petitioner's Request that the Honorable Court Accept Amended § 2254 Petition for Federal Habeas Relief* (ECF No. 29) are OVERRULED.
2. The Magistrate Judge's Proposed Findings and Recommended Disposition (ECF No. 28) is ADOPTED.
3. Petitioner Joseph Blea's *Motion to Amend 28 U.S.C. Section 2254 Habeas Corpus Petition* (ECF No. 25) is DENIED.
4. Petitioner Joseph Blea's case is DISMISSED with prejudice.
5. A certificate of appealability is DENIED.

SENIOR UNITED STATES DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH BLEA,

Petitioner,

v.

No. 2:20-cv-00986-JCH-JHR

RICHARD MARTINEZ and
ATTORNEY GENERAL OF THE
STATE OF NEW MEXICO,

Respondents.

FINAL JUDGMENT

This Court has entered contemporaneously an Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition. The Order dismisses with prejudice all claims in this case and denies a certificate of appealability. This Final Judgment, in compliance with Rule 58 of the Federal Rules of Civil Procedure, adjudicates all existing claims and liabilities of the parties.

IT IS HEREBY ORDERED that final judgment is entered in favor of Respondent on Petitioner's claims, which are **DISMISSED WITH PREJUDICE**, and thus this case is **DISMISSED** in its entirety.

SENIOR UNITED STATES DISTRICT JUDGE

Filed March 17, 2023
See App. 1B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

JOSEPH BLEA,

Petitioner,

v.

No. 2:20-cv-00986-JCH-JHR

RICHARD MARTINEZ and
ATTORNEY GENERAL OF THE
STATE OF NEW MEXICO,

Respondents.

PROPOSED FINDINGS AND RECOMMENDED DECISION DENYING MOTION TO AMEND HABEAS CORPUS PETITION AND DISMISSING CASE

Joseph Blea filed a Motion to Amend his 28 U.S.C. § 2254 Habeas Corpus Petition on August 11, 2022. [Doc. 25]. The motion followed multiple prior orders to amend to correct deficiencies in the form of Blea's prior motions. *See recitations of the record*, [Doc. 25, pp. 13]. The current motion appears to address those deficiencies, including attachment of the proposed motion as an exhibit, and conform to the most recent order to amend. [Doc. 23]. Deemed responsive to the Court's direction, the motion will be considered on its merits under Fed. R. Civ. P. 15. Respondents filed a response on August 25, 2022. [Doc. 26]. Blea replied on September 29, 2022. [Doc. 27].

BACKGROUND

At the heart of Blea's proposed amended petition is his persistent argument that his prosecution by the State of New Mexico was invalid because the applicable statute of limitations had expired. More specifically, Blea insists that the limitations period was fifteen years after the 1988 offense, pursuant to the statute in effect at that time, and that a subsequent amendment lengthening the expiration period cannot be applied to him because it would violate

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the ex post facto clause of the United States Constitution. Key to the claim is his argument that he has a right to application of the original limitation that vested in 1988 when the crime was reported to police.

Blea couches the argument in various ways in his proposed petition, as ineffective assistance of counsel as well as deprivation of due process, *see* [Doc. 25, p. 4], but each is built upon the foundation of his ex post facto argument:[1]

> In the instant case, the cause of action had accrued, thus, rights had vested. Therefore, the 1997 Amendment, eliminating the time period on first-degree and capital offenses, did not apply retroactively. Simply, the original application (15) fifteen-year time period governed. Furthermore, when the original applicable governing time period expired before prosecution commenced, petition became vested with a "fully complete statute of limitations defense" that forever barred prosecution.

[Doc. 25, p. 7] (emphasis omitted).

Each of Blea's proposed arguments fails if that argument is mistaken, *i.e.*, if application of the extended limitations period to Blea was not an ex post facto violation, amendment to allow the argument would be futile. The operative dates are not disputed, so the claim can be resolved on the present record as a matter of law. Resolution requires, first, a review of New Mexico law describing the operation of the statute that extended the limitations period and, second, analysis of the federal constitutional prohibition of ex post facto laws.

LEGAL STANDARDS

Rule 15 authorizes the Court to allow amendment of pleadings and instructs that "the court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Leave to amend

[1] Blea also asserts an alternative claim of unreasonable determination of facts by the State court that summarily denied his state petition for habeas corpus, [Doc. 25, p. 6], but does not develop the argument nor dispute any of the facts (*i.e.*, dates) that inform his ex post facto argument. Blea says "the fact-finding process was defective because [he] never had a fair chance in state court to have the relevant habeas facts heard and determined" but he does not reveal what additional facts would be material to his claim. *Id.*

is subject, however, to some limiting principles, and specific experience has shown that justice is not served when proposed claims will inevitably be dismissed because amendment in those circumstances would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

ANALYSIS

a. Blea's first argument that he was entitled to the same statute of limitations protection effective at the time of his offense fails.

Blea's first argument is that the State of New Mexico did not intend that the amendment of the limitations period apply to people in his situation, but instead he was entitled to the protection of the statute of limitations in effect at the time that he committed the offense and it was reported to the police. His primary argument is that "the New Mexico Supreme Court applies the statute of limitations that is specific to the statute at the time the cause of action accrued and not the amended time limit." [Doc. 25, p. 7] (emphasis omitted). He relies upon a federal court opinion applying a New Mexico statute of limitations in a civil cause of action for unpaid overtime. *See Andrew v. Schlumberger Technology Co.*, 808 F.Supp.2d 1288 (D.N.M. 2011). In that case, a one-year limitations period in effect when the claim accrued was later amended to three years; the employer asserted that claims filed just within the three-year limit were time-barred after one year. 808 F.Supp.2d at 1291. The Court's analysis of federal law of retroactivity in that case, *see* 808 F.Supp.2d at 1293-94, is not determinative of the interpretation of the New Mexico amendment in this case, partly because that would be an issue of New Mexico law. *See* 808 F.Supp.2d at 1294 ("New Mexico law controls whether a New Mexico statute of limitation is retroactive."). The federal court proceeded to analyze New Mexico law, notably relying upon only civil cases, and determined that "[t]here does not appear to be any distance" between the federal and New Mexico law of retroactivity that applied in

Andrew. *Id.*, at 1294. Ultimately, as pertinent here, the Court concluded that New Mexico generally considers statutes "impair[ing] vested rights under prior law" to be retroactive in nature. *Id.*, at 1295 (citing *Wood v. State of N.M. Edu. Ret. Bd.*, 149 N.M. 455, 250 P.3d 881, 886 (Ct.App. 2010) (additional citation omitted)). The Court then extended its analysis to whether there was evidence that the New Mexico legislature intended retroactive application of the longer limitations period for wage cases, concluded that it did not, and dismissed the employer's claim that had expired under the older shorter period. *Andrew*, 808 F.Supp.2d at 1299-1300.

Classifying a statute as retroactive because it impairs vested rights, however, does not necessarily mean the statute is void. In fact, the New Mexico Supreme Court reached the contrary conclusion in a case interpreting the original criminal statute of limitations and amendment at issue here. In *State v. Montoya*, 2010-NMSC-026, 148 N.M. 305, 236 P.2d 24, the Court engaged in the same general retroactivity analysis described in *Andrew*, *see* 2010-NMSC-026, ¶¶ 8-9, similarly concluding that "[a] statute ... is considered retroactive if it impairs vested rights acquired under prior law...." *Id.*, ¶ 9 (citing *Howell v. Heim*, 118 N.M. 500, 506, 882 P.2d 541, 547 (1994). The New Mexico court however, noted an important limitation: unless rooted in a statutory right, a civil statute of limitations does not create a vested right in the defendant and can be amended anytime with application to any suit filed after the effective date, regardless of the date of injury. *Id.*, ¶ 12.

The *Montoya* court then, in contrast to *Andrew*, examined additional principles relevant to criminal laws. 2020-NMSC-026, ¶¶ 10-18. Criminal limitations, it noted, "'represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice'", ¶ 10 (quoting *United States v. Marion*, 404 U.S. 317, 323 (1971), and

> are entirely subject to the will of the Legislature, and may be changed or repealed altogether in any case where a right to acquittal has not been absolutely acquired by the completion of the [original] period of limitation ... The State makes no contract with criminals at the time of the passage of acts of limitations that they shall have immunity from punishment if not prosecuted within the statutory period.

Id. (quoting *People v. Isaacs*, 37 Ill. 2d 205, 226 N.E.2d 38, 51-52 (1967)) (internal quotation marks and citation omitted) (bracketed language in original). In short, "a criminal defendant 'has no legitimate expectancy interest in the application of [the original unexpired] limitation period.'" *Id.* (citing *State v. Skakel*, 276 Conn. 633, 888 A. 2d 985 (2006)). The Montoya court clearly and unequivocally refutes Blea's paradigm of amendments to criminal statutes of limitations: "[b]ecause a defendant does not have a vested interest in an unexpired statute of limitations, a legislative amendment extending or abolishing the limitation period does not impair vested rights...." *Id.*

Montoya clearly states another fundamental reason why a criminal defendant in Blea's circumstance cannot claim a right to a pre-amendment limitations period. Referring to the exact statutory history cited here, "[s]tated simply, the 1997 amendment is not retroactive in nature because it 'bar[s] only prospective prosecutions.'" *Id.*, ¶ 11 (citing *State v. Schultzen*, 522 N.W.2d 833, 835 (Iowa 1994)). In other words, a criminal statute of limitations is a constraint on prosecutors; the limitation that applies is the current law on the date the prosecution begins, rather than the date of offense or the date of the first report to law enforcement.

Montoya's particular holding is precisely on point in this case, explaining why it was applied against Blea by the New Mexico Court of Appeals: "the statute of limitations governing Defendant's conduct after July 1, 1982 [the earliest reach back of the amended period] had not expired prior to the effective date of the 1997 amendment and, therefore,

Defendant was not, at any time, free from prosecution. Thus, Defendant did not have a vested or substantive right in the original limitations period and application of the 1997 amendment is not retroactive." *Id.*, ¶ 17 (bracketed language added). Blea, like Montoya, remained subject to prosecution under the original limitations period without expiration up to the effective date of the 1997 amendment, which became the applicable statute of limitations when his prosecution commenced in 2010.

b. Blea's second argument that applying the extended limitations period is unconstitutional fails.

Blea's second argument is that application of the extended limitations period in his situation would render it an ex post facto law and thus void under the Constitution of the United States.[2] That argument is punctured by the federal law defining ex post facto laws in combination with the principle, discussed above, that criminal statutes of limitations provide protection from prosecution only upon expiration of the limitations period and not before. *See generally Stogner v. California*, 539 U.S. 607 (2003). The fact pattern in *Stogner* is inapposite to Blea's case, as Stogner's prosecution was time-barred by expiration of the limitations period before California amended and extended the statute of limitations. *Id.* at 609-10. Considering four classic categories of ex post facto laws long accepted in federal jurisprudence, the *Stogner* Court concentrated on the second category and held that, where a criminal who was at risk of prosecution and punishment survives the limitations period and is no longer at risk, the state cannot then extend the prior limitations to pull him back into a new prosecution without effectively applying a greater "punishment" for a greater "crime" than he committed. *Id.* at 610-12. Such a law impermissibly "inflict[s] punishments, where the party was not, by law,

[2] Blea also cites the ex post facto clause of the New Mexico Constitution, but the federal court in habeas corpus proceedings does not decide state constitutional issues.

liable to any punishment." *Id.*, at 613 (quoting *Calder v. Bull*, 3 Dall. 386, 389, 1 L.Ed. 648 (1798) (internal quotation marks omitted)). On the other hand, where a defendant such as Blea was never free from prosecution, the extension of the time limit does not increase the punishment for the original crime and is not ex post facto.

Therefore, contrary to Blea's argument, he had no vested right to shelter under the fifteen-year duration of the original statute of limitations and, absent such a right, there was no ex post facto violation when the expanded limitation was applied to his prosecution. Nor was he free from prosecution for any period of time prior to extension of the limitations period by the 1997 amendment, and so there is no ex post facto violation. In short, Blea's sole legal challenge to his conviction and sentence is flawed and mistaken, and so allowing him to amend his petition and go forward would be futile.

CONCLUSION AND RECOMMENDATION

Based on the analysis above, I recommend that the Court deny Blea's motion to amend as futile. In the absence of an amended petition, Blea has failed to state a cognizable claim for relief. Therefore, I further recommend that the Court dismiss this matter and terminate all pending motions as moot.

JERRY H. RITTER
U.S. MAGISTRATE JUDGE

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed**

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