

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-11209
USDC No. 7:14-CV-3



Certified as a true copy and issued
as the mandate on Oct 09, 2017

BRIAN NORWOOD,

Attest: *Jyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the
Northern District of Texas, Wichita Falls

ORDER:

Brian Norwood, Texas prisoner # 1510723, moves for a certificate of appealability (COA) to appeal the district court's judgment dismissing his 28 U.S.C. § 2254 application challenging his conviction and sentence for murder. The district court determined that his § 2254 application was untimely and that he was not entitled to equitable tolling.

A COA 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); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where, as here the district court's denial of federal habeas relief is based on procedural grounds, this court will issue a COA "when the prisoner shows, at least, that jurists of reason would find it

Appendix A

debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Norwood has not met this standard. *See Holland v. Florida*, 560 U.S. 631, 645, 649 (2010); *Butler v. Cain*, 533 F.3d 314, 317 (5th Cir. 2008); *Foreman v. Dretke*, 383 F.3d 336, 337-41 (5th Cir. 2004).

Accordingly, Norwood’s motion for a COA is DENIED. His motion for leave to proceed in forma pauperis is also DENIED.

Signed: 10-6-2017

_____/s/ Catharina Haynes_____
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BRIAN NORWOOD,

Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

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Civil No. 7:14-CV-003-O

ORDER DISMISSING PETITION

This is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The Petitioner, Brian Norwood, challenges the validity of his Wichita County conviction for the offense of murder. *See* Petition, ECF No. 3 at 2. Petitioner was convicted on April 15, 2008. *See id.* On April 23, 2009, Norwood's conviction was affirmed on direct appeal. *See id.* at 3. Pursuant to his first state habeas application, Norwood was granted leave to file an out-of-time petition for discretionary review ("PDR"). *Ex parte Norwood*, App. No. AP-76,680, 2011 WL 5437550 (Tex. Crim. App. 2011). His deadline for filing the PDR was January 4, 2012. Norwood filed a PDR but it was dismissed on March 7, 2012 as untimely. *Norwood v. State*, PD-0056-12, Respondent's Exhibit A at 3-5. The instant petition was filed on January 1, 2014.¹

¹ Federal habeas petitions filed *pro se* are considered filed, for purposes of the statute of limitations, on the date on which the petition is tendered to prison officials for mailing. *See Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998) (applying the "mailbox rule" to the filing of a federal habeas petition). The instant petition is dated as having been signed on January 1, 2013. But it is obvious from the time-line of events set forth by Norwood in his petition, that he signed the petition in 2014 rather than 2013. The petition was docketed by the Clerk of Court on January 6, 2014. For purposes of the Court's review, the signature date of "January 1, 201[4]" will be considered the filing date.

Appendix B

Norwood seeks federal habeas relief on the ground of ineffective assistance of counsel at trial. *See* Petition, ECF No. 3 at 6-7.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) there is a one-year limitation period during which an inmate must file any federal petition for writ of habeas corpus in which he seeks relief under § 2254. The AEDPA provides in pertinent part:

(d)(1) 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.

(2) The 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).

Norwood was convicted on April 15, 2008. *See* Petition, ECF No. 3 at 2. On April 23, 2009, his conviction was affirmed on direct appeal. *Id.* at 3. His deadline for filing a PDR was January 4, 2012. Because his PDR was dismissed as untimely, Norwood’s conviction became final on January 4, 2012, the last day on which he could have timely filed his PDR. *See Webb v. Thaler*, No.

07-51407 (5th Cir. June 25, 2010) (unpublished per curiam) (when leave to file an out-of-time PDR is granted, the state conviction is not yet final); *Dolan v. Dretke*, 168 Fed. App'x 10, 11 (5th Cir. 2006) (unpublished per curiam) (because PDR is part of direct review process under Texas law, conviction is final upon expiration of extension of time for filing PDR); *Smith v. Thaler*, No. 3:11-CV-1485-D, 2013 WL 1760871 *2 (N.D. Tex. Mar. 6, 2013) (conviction final on the last day on which petitioner could have filed a timely PDR following extension granted by Texas Court of Criminal Appeals), recommendation adopted, 2013 WL 1760946 (N.D. Tex. Apr. 24, 2013); *Tepp v. Quarterman*, No. 4:06-CV-284-A, 2007 WL 3238654 *2-3 (N.D. Tex. Oct. 31, 2007) (same). Therefore, his one-year deadline for filing a federal habeas petition was January 4, 2013.

A properly filed state habeas application will toll the statute of limitations. Norwood filed his state habeas application on January 2, 2013.² *Ex parte Norwood*, App. No. WR-76,614-02, ECF No. 17-10 at 19. On that day, he had 2 days remaining on his one-year federal limitation period. The Texas Court of Criminal Appeals denied relief on December 18, 2013. *Id.*, ECF No. 17-9 at 1. Petitioner then had two more days, until December 20, 2013, to file his federal habeas petition. The instant petition was signed on January 1, 2014 and filed on January 6, 2014. Even assuming that the date signed is the filing date, the instant petition is 12 days late.

In his reply to Respondent's answer, Norwood argues that his petition is not time-barred and, alternatively, that he is entitled to equitable tolling of the limitation period. *See* Petitioner's Reply to Respondent's Answer, ECF No. 19.

² State habeas applications "are deemed filed at the time they are delivered to prison authorities" for mailing. *Richards v. Thaler*, 710 F.3d 573, 578 (5th Cir. 2013).

Norwood states that he tendered his PDR to prison officials for mailing on January 4, 2012, the last day on which he could have filed his PDR. *See id.* at 1-2. He asserts that, in light of the “mailbox rule,” the Texas Court of Criminal Appeals erroneously dismissed his petition. Norwood argues that, because his PDR was timely filed, the date that the Texas Court of Criminal Appeals dismissed the PDR, March 30, 2012, should be considered the date on which his conviction became final for the purpose of calculating the one-year statute of limitations applicable to the instant action. *Id.*

Federal habeas relief is available only to rectify violations of federal constitutional rights. *See Montoya v. Scott*, 65 F.3d 405, 418-20 (5th Cir.1995). Federal habeas relief will not issue to correct alleged errors of state constitutional, statutory, or procedural law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Manning v. Blackburn*, 786 F.2d 710, 711 (5th Cir.1986). Norwood claims that, pursuant to the mailbox rule, his PDR was timely filed and that the Texas Court of Criminal Appeals erred in dismissing it as untimely. This claim implicates an alleged violation of a state procedural rule. Failure to comply with the requirements of a state procedural rule does not, of itself, raise a federal constitutional question cognizable in a federal habeas corpus proceeding. Federal courts do not sit to enforce state procedural rules. *Stewart v. Estelle*, 634 F.2d 998, 999 (5th Cir.1981).

Where a PDR is dismissed as untimely, a Petitioner’s conviction is deemed final on the last day on which he could have filed a timely PDR. *See e.g., Butler v. Cain*, 533 F.3d 314, 317 (5th Cir. 2008) (rejecting petitioner’s argument that the limitations period should run from the date his untimely PDR was denied); *Randle v. Crawford*, 604 F.3d 1047, 1054-55 (9th Cir. 2010) (rejecting

argument that conviction is final and § 2244(d)'s limitations period runs from the date an appeal is dismissed as untimely). In the instant case, Petitioner's conviction became final on January 4, 2012.

Norwood is not entitled to statutory tolling of the limitation period. He has not shown any impediment to filing created by state action in violation of the Constitution or laws of the United States, he has not shown any right newly recognized by the Supreme Court made retroactive on collateral review, and he has not shown any undiscovered factual predicate underlying his grounds for relief.

The Court must next consider whether the circumstances of the instant case warrant the application of equitable tolling. *See Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000) (holding that the one-year statute of limitations is subject to equitable tolling). The limitation period applicable to habeas actions is not a jurisdictional bar and can, in rare and exceptional circumstances, be equitably tolled. *E.g., Felder v. Johnson*, 204 F.3d 168, 170-71 (5th Cir. 2000); *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999); *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998).

In *Holland v. Florida*, ___ U.S. ___, 130 S.Ct. 2549 (2010), the Supreme Court set forth a two part test for the application of equitable tolling in a federal habeas corpus proceeding. First, the petitioner must show "that he has been pursuing his rights diligently." *Id.* at 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Second, the petitioner must show "that some extraordinary circumstance stood in his way and prevented timely filing." *Id.*

For equitable tolling to be appropriate, external forces, rather than a litigant's lack of diligence, must account for the failure of a complainant to file a timely claim. *See Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 235 (1959) (finding a limitation period equitably tolled where

the adversary misled the complainant with regard to the deadline for filing an action). “Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.” *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (quoting *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996)). Such tolling is an extraordinary remedy that courts should extend sparingly and not to what may be, at best, a garden variety claim of “excusable neglect.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Coleman*, 184 F.3d at 402.

“[N]either a plaintiff’s unfamiliarity with the legal process nor his lack of representation during the applicable filing period merits equitable tolling.” *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999) (citing *Barrow v. New Orleans S.S. Ass’n*, 932 F.2d 473, 478 (5th Cir. 1991)). Furthermore, “ignorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing.” *Fisher*, 174 F.3d at 714 (citing *Saahir v. Collins*, 956 F.2d 115, 118-19 (5th Cir. 1992)); *see also Barrow*, 932 F.2d at 478 (“lack of knowledge of the filing deadlines,” “lack of representation,” “unfamiliarity with the legal process,” and “ignorance of legal rights” generally do not justify tolling).

In the instant case, Petitioner meets neither part of the test for equitable tolling. Even assuming that Norwood was not aware, until March 30, 2012, that his PDR was deemed untimely, the record reflects that he waited approximately nine more months to file his state application for writ of habeas corpus. Norwood argues that the delay was justified because he had to send the trial record out for copies and wait for its return, that he had to conduct research and construct his arguments, and that he is unskilled and lacks experience drafting legal documents. *See* Petitioner’s

Reply to Respondent's Answer, ECF No. 19 at 5. Norwood has failed to meet his burden of showing that equitable tolling should apply. He has not demonstrated the exercise of diligence in pursuing his remedies. *See Webb v. Dretke*, 165 Fed. App'x 375, 376 (5th Cir. 2006) (declining to extend equitable tolling where tolling argument did not explain prisoner's 11-month delay in seeking state postconviction relief); *Byrd v. Thaler*, No. 4:10-CV-715-A, 2011 WL 208402, at *5 (N.D. Tex. Jan. 24, 2011) (finding federal petition time-barred where, even assuming state court error, petitioner waited almost five months to file (prematurely) a federal petition, and almost 11 months to file a state habeas application). The circumstances alleged by Norwood in support of his equitable tolling argument do not rise to the level of extraordinary circumstances that excuse his delay and lack of diligence in pursuing his remedies in a timely manner. Accordingly, this case is subject to dismissal as barred by the statute of limitations.

For the foregoing reasons, the petition for writ of habeas corpus is **DISMISSED** as **TIME-BARRED**.

SO ORDERED this 6th day of July, 2016.


Reed O'Connor
UNITED STATES DISTRICT JUDGE