

August 31, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 16-3798

JORGE ALVARADO, Appellant

VS.

ADMINISTRATOR NEW JERSEY STATE PRISON; ET AL.

(D.N.J. Civ. No. 2-15-cv-03878)

Present: MCKEE, JORDAN and RESTREPO, Circuit Judges

Submitted are:

- (1) By the Clerk, for possible dismissal due to a jurisdictional defect;
- (2) Appellant's response in support of jurisdiction;
- (3) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);
- (4) Appellees' response to the request for a certificate of appealability; and
- (5) Appellant's motion to amend previous filed application for certificate of appealability together with amended application for certificate of appealability;

in the above-captioned case.

Respectfully,

Clerk

ORDER

Based on the District Court's grant of Appellant's motion to extend the time to appeal, the appeal is timely and we have jurisdiction to consider it. See Fed. R. App. P. 4(a)(1)(A), (a)(5). The motion to amend the application for a certificate of appealability

APPENDIX A

is granted and the amended application for a certificate of appealability is denied. Appellant did not meet the standard for equitable tolling of the filing deadline for his federal habeas petition, substantially for the reasons set out in the District Court's opinion. See Holland v. Florida, 560 U.S. 631, 649 (2010); Pace v. DiGuglielmo, 544 U.S. 408, 414 (2005). "In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001); cf. also Johnson v. Hendricks, 314 F.3d 159, 162-63 (3d Cir. 2002) (holding that the limitations period for filing a petition in a non-capital case could not be equitably tolled by a petitioner's reliance on his attorney's erroneous advice as to the filing deadline). Jurists of reason would not therefore find it "debatable whether the district court was correct" in dismissing the petition on limitations grounds. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(c).

By the Court,

s/ L. Felipe Restrepo
Circuit Judge

Dated: September 11, 2017
tyw/cc: Jorge Alvarado
Stephanie Davis-Elson, Esq.



Marcia M. Waldron

Marcia M. Waldron, Clerk

Certified order issued in lieu of mandate.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK VICINAGE

Jorge Alvarado,

Petitioner,

v.

Stephen D'Ilio,

Respondent.

:
:
:
:
:
:
:
:
:
:

Civ. Action No. 15-3878 (SRC)

ORDER

For the reasons described in the accompanying Opinion filed herewith:

IT IS on this 23rd day of August, 2016.

ORDERED that Petitioner's petition for writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 1) **IS DISMISSED** because it is barred by the one-year statute of limitations in 28 U.S.C. § 2244(d); and it is further

ORDERED that the Clerk of the Court shall serve this Order and the accompanying Opinion on Petitioner by regular U.S. mail; and it is further

ORDERED that the Clerk shall close this matter.

s/ Stanley R. Chesler
Stanley R. Chesler
United States District Judge

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK VICINAGE

Jorge Alvarado,

Petitioner,

V.

Stephen D'Ilio,

Respondent.

Civ. Action No. 15-3878 (SRC)

OPINION

APPEARANCES:

Jorge Alvarado
New Jersey State Prison
P.O. Box 861
Trenton, N.J. 08625
Petitioner, pro se

Stephanie Davis-Elson, Assistant Prosecutor
Office of the Hudson County Prosecutor
Administration Building, 595 Newark Ave.
Jersey City, New Jersey 07306
Counsel for Respondent

I. BACKGROUND

On June 8, 2015, Petitioner filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (ECF No. 1), and Respondent filed a limited answer (ECF No. 6), arguing that the petition should be dismissed as barred by the statute of limitations, 28

papers. Petitioner's written requests for assistance made clear that he was waiting for a decision on his petition for certification from the New Jersey Supreme Court, and he was not sure whether his next step was to file his federal habeas petition or his petition for post conviction relief in Superior Court.

Complicating matters is the fact that Petitioner did not receive, until February 2010, the Public Defender's letter, dated May 23, 2008,² notifying him that the New Jersey Supreme Court denied his petition for certification. The New Jersey Supreme Court decision triggered the 90-day period to petition for certification to the U.S. Supreme Court, and, upon the expiration of the 90-day period, the start of the one-year habeas statute of limitations under 28 U.S.C. § 2244(d)(1)(A). See Jones v. Morton, 195 F.3d 153, 157 (3d Cir. 1999) (quoting Kapral v. United States, 166 F.3d 565, 575 (3d Cir. 1999) ("[under § 2244(d)(1)(A), a state court criminal judgment becomes "final," and the statute of limitations begins to run, "at the conclusion of review in the United States Supreme Court or when the time for seeking certiorari review expires.""))

At the hearing, Petitioner testified that, because he could not read and understand the law written in English, he relied on advice of a prison paralegal who told him the next step in the

² Petitioner's Reply to Respondent's Answer to Petition for Writ of Habeas Corpus, ECF No. 7, Exs. A and B, Letters.

limitations. Petitioner testified that he filed his federal habeas petition when he learned from another inmate that the prison paralegal's advice was incorrect.

The Third Circuit has held that an attorney's mistake in calculating the due date for a § 2254 habeas petition is not an extraordinary circumstance justifying equitable tolling of the statute of limitations. Johnson v. Hendricks, 314 F.3d 159, 163 (3d Cir. 2002). The same must apply to the advice of a prison paralegal, because erroneous advice does not prevent a petitioner from asserting his rights. Id. Therefore, Petitioner has not shown an extraordinary circumstance to justify equitable tolling of the statute of limitations under 28 U.S.C. § 2244(d) (1) (A).

III. CONCLUSION

For the reasons discussed above, in the accompanying opinion filed herewith, the Court will dismiss Petitioner's § 2254 habeas petition as barred by the statute of limitations.

Dated: August 23, 2016

s/ Stanley R. Chesler
Stanley R. Chesler
United States District Judge