A. Decision of the Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit

No. 16-3718

Larry Gene Burks,

Plaintiff - Appellee,

v.

Wendy Kelley, Director, Arkansas Department of Correction (originally named as Ray Hobbs),

Defendant - Appellant.

Appeal from United States District Court
for the Eastern District of Arkansas - Pine Bluff

Submitted: September 20, 2017
Filed: February 5, 2018

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

COLLOTON, Circuit Judge.

Larry Burks was convicted of rape in Arkansas and sentenced to thirty years in prison. When Burks, more than five years later, petitioned for a writ of habeas corpus under 28 U.S.C. § 2254, there was a dispute about whether the petition was timely. The district court determined that the one-year statute of limitations should be equitably tolled and deemed Burks's petition timely. The State appeals, and we conclude that Burks is not entitled to equitable tolling, because he did not demonstrate reasonable diligence during the limitations period. Accordingly, we vacate the district court's order and remand with directions to dismiss the petition as untimely.

Burks was convicted and sentenced in March 2008. The Arkansas circuit court entered judgment on March 19, 2008. Burks's trial counsel then moved to withdraw from further representation of Burks. The motion stated that Burks "would like to begin the appeal process immediately," and asked that Burks "be declared indigent, and that a public defender be assigned to represent him for the appeals process." At a hearing on April 11, 2008, counsel advised the circuit court that Burks "does wish to appeal."

The special judge who presided at the April 11 hearing found that Burks was indigent and granted counsel's motion to withdraw. The judge, however, did not appoint substitute counsel to assist Burks with his direct appeal. The transcript reflects that a public defender who was present and the presiding judge both believed that an appellate court would appoint counsel for Burks after the circuit court granted trial counsel's motion to withdraw. Therefore, the court relieved trial counsel but stated that "the Public Defender's not appointed." The court told Burks that he was declared indigent, and that "you can proceed with your own appeal and ask for assistance, I suppose, if you need to."

Burks never filed a direct appeal, and the judgment in his criminal case thus became final on April 18, 2008, thirty days after it was entered. *See* 28 U.S.C. § 2244(d)(1)(A); Ark. R. App. P. Crim. 2(a)(1). In May 2008, Burks filed *pro se* motions with the circuit court for all hearing and trial transcripts and for discovery. The court denied both motions, stating that "defendant has not demonstrated a compelling need for specific documentary evidence to support an allegation in a post-conviction proceeding." In his motion for transcripts, Burks claimed that he moved the same day to vacate his conviction, but there is no record of a motion to vacate. In his federal petition for habeas corpus, Burks similarly claimed that he filed a notice of appeal, a Rule 37 petition for state postconviction relief, and a habeas corpus petition in July 2008 while he was incarcerated at the Varner Unit. There is no record of any of such filing.

In December 2013, more than five years after the judgment became final, Burks began to inquire about the status of his case. He sent letters to the Arkansas Supreme Court, the Arkansas Judicial Discipline & Disability Commission, the Arkansas Bar Association, and the Arkansas State Public Defender Commission. Shortly thereafter, the Arkansas circuit court held two hearings to clarify why Burks did not appeal and why he had waited five years to inquire about his case. Burks claimed that he personally had filed an appeal, a Rule 37 petition, and a habeas corpus petition; he also testified that "[o]ne of the guys working in the law library at Varner" told him that an appeal would take three to five years. The circuit court, having developed the record, ordered the Public Defender's Office to pursue a belated appeal for Burks.

On March 20, 2014, the Arkansas Supreme Court summarily denied Burks's motion for leave to pursue a belated appeal. Burks's motion was filed seventy-one months after the entry of judgment, and the Arkansas Rules of Appellate Procedure provide that "no motion for belated appeal shall be entertained by the Supreme Court unless application has been made to the Supreme Court within eighteen (18) months of the date of entry of judgment." Ark. R. App. P. Crim. 2(e).

Burks then filed a petition for writ of habeas corpus in the district court on April 25, 2014. Unless the statute of limitations period was tolled, it would have expired more than five years earlier on April 20, 2009, one year after the entry of judgment. *See* 28 U.S.C. § 2244(d)(1)(A). A magistrate judge recommended dismissing the petition as untimely. The district court, however, concluded that the limitations period was tolled for equitable reasons, because the Arkansas state courts improperly denied Burks the assistance of counsel for a direct appeal. The court thus ruled that Burks's petition was timely. On June 27, 2016, the court ordered the State, within 120 days, to "appoint Burks appellate counsel, accept his request for an appeal, and consider the appeal as having been timely filed, or vacate his convictions and re-try him." The court further provided that if the State did not comply, then the court would grant Burks's petition in its entirety and vacate the convictions.

The State moved to alter or amend judgment under Federal Rule of Civil Procedure 59(e). The district court ruled that the motion was not proper, because the court thought the June 27 decision was not a final order, and Rule 59(e) does not provide for relief from a nonfinal order. *See Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999). The State then filed a notice of appeal, and this court stayed the district court's June 27 order pending resolution of this appeal.

In view of the district court's assertion that the June 27 ruling was not a final order, we address first our jurisdiction over this appeal. This court has jurisdiction under 28 U.S.C. § 1291 over appeals from all final decisions of the district courts. We conclude that the district court's order of June 27 was a final decision. By ordering the State to choose between providing Burks an opportunity to pursue a belated direct appeal with counsel or accepting vacatur of Burks's convictions, the district court ended the litigation on the merits and left nothing for the court to do but execute the judgment. As the district court observed in its June 27 order, vacatur of a conviction may be conditioned on a State's refusal to correct a wrong, and federal courts have broad discretion in conditioning a judgment granting habeas relief. But the conditional nature of habeas relief does not mean that a decision is nonfinal. We held in *Gray v. Swenson*, 430 F.2d 9 (8th Cir. 1970), that a comparable order was a final decision appealable by the State. There, a district court ordered a petitioner released from confinement unless the State within ninety days afforded him an appropriate evidentiary hearing about the voluntariness of a confession. *Id.* at 11; *accord Walton v. Caspari*, 916 F.2d 1352, 1354 (8th Cir. 1990); *Robinson v. Wyrick*, 635 F.2d 757, 759 (8th Cir. 1981).

Although Burks raised other claims in his habeas petition, an order granting relief on one claim is typically considered final. *See Sprosty v. Buchler*, 79 F.3d 635, 645 (7th Cir. 1996); *Phifer v. Warden*, 53 F.3d 859, 862-63 (7th Cir. 1995); *Blazak v. Ricketts*, 971 F.2d 1408, 1410-12 (9th Cir. 1992) (per curiam). In this case, if the State were to grant Burks a belated direct appeal, then his remaining claims would no longer be ripe for review in a federal postconviction proceeding and must be renewed if he is unsuccessful on direct appeal. Alternatively, if the State declines to provide for a belated appeal, and the convictions are vacated, then Burks will have received all of the relief requested. The June 27 decision is therefore final and appealable.*

On the merits of the State's appeal, we begin with the proposition that the statute of limitations applicable to habeas corpus petitions may be tolled for equitable reasons in limited circumstances. A petitioner is entitled to equitable tolling only if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation omitted). On *de novo* review, we conclude that Burks is not entitled to this narrow form of equitable relief because he failed to pursue his rights diligently.

The diligence required for equitable tolling is "reasonable diligence," not "maximum feasible diligence." *Holland*, 560 U.S. at 653. But Burks's actions in this case do not meet the standard of reasonableness. Although Burks expressed a desire to appeal immediately following his conviction in March 2008, and filed *pro se*

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*This court in *Stewart v. Bishop*, 403 F.2d 674 (8th Cir. 1968), held only that the court lacked jurisdiction over a habeas petitioner's attempt to appeal a district court's interlocutory orders granting conditional relief on one of five claims, where the orders did not dismiss or reject any of the claims for relief and were directed entirely toward requiring the State to afford certain relief to the petitioner. The court did not address whether the State could have appealed an order granting conditional relief to the petitioner.

motions for transcripts and discovery in the circuit court in May 2008, he did not make any inquiry about obtaining counsel or gaining relief from his conviction before the limitations period expired in April 2009. Burks did not take action until December 2013, more than five years after the judgment was entered. Sixty-seven months of inactivity by a prisoner who wishes to challenge his conviction is not reasonable diligence.

That "one of the guys working in the law library at Varner" allegedly told Burks that an appeal could take three to five years does not excuse Burks's inaction. Burks had no sound reason to believe that an appeal had been filed. The circuit court told him in April 2008 that the public defender was *not* appointed to represent him, and that Burks could proceed with his own appeal if he wished. Burks's claim that he filed his own direct appeal while incarcerated is unsupported by the record, but at the same time belies any suggestion that he thought an appeal was already pending.

Even assuming that discussion at the hearing in April 2008 might have led Burks to believe that an appellate court would appoint counsel for him, a reasonably diligent prisoner should have done something thereafter to protect his rights. Where another habeas petitioner mistakenly believed that an attorney had filed a timely notice of appeal in his case, for example, we held that a reasonably diligent person would not have waited even a year to contact his attorney about the status of the appeal. *Anjulo-Lopez v. United States*, 541 F.3d 814, 818 (8th Cir. 2008). Likewise, a prisoner in Burks's position should have made inquiry about the status of his case within the one-year limitations period; it was not reasonable for him to do nothing for more than five years after filing two unsuccessful *pro se* motions in May 2008. Because Burks was not reasonably diligent, he is not eligible for equitable tolling of the statute of limitations.

For these reasons, the district court's order of June 27, 2016 is vacated, and the case is remanded with directions to dismiss the petition as untimely under 28 U.S.C. § 2244(d)(1)(A).

B. Order denying rehearing by the Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-3718

Larry Gene Burks

Appellee

v.

Wendy Kelley, Director, Arkansas Department of Correction (originally named as Ray Hobbs)

Appellant

Appeal from U.S. District Court for the Eastern District of Arkansas - Pine Bluff
(5:14-cv-00154-BSM)

ORDER

The pro se petition for rehearing by the panel with a request for appointment of new counsel is denied.

March 23, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

C. Original recommended disposition denying petition.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

LARRY GENE BURKS
ADC #141354 PETITIONER

v. CASE NO. 5:14-cv-00154-BSM-JTK

WENDY KELLEY[1], Director
Arkansas Department of Correction RESPONDENT

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION INSTRUCTIONS

The following recommended disposition has been sent to United States District Court Chief Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the United States

[1]Wendy Kelley replaced Roy Hobbs as Director of the Arkansas Department of Correction. Under Federal Rule of Civil Procedure 25(d), Wendy Kelley is automatically substituted as Respondent in this matter.

District Judge, you must, at the same time that you file your written objections, include a "Statement of Necessity" that sets forth the following:

1. Why the record made before the Magistrate Judge is inadequate.

2. Why the evidence to be proffered at the requested hearing before the United States District Judge was not offered at the hearing before the Magistrate Judge.

3. An offer of proof setting forth the details of any testimony or other evidence (including copies of any documents) desired to be introduced at the requested hearing before the United States District Judge.

From this submission, the United States District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A 149
Little Rock, AR 72201-3325

Introduction

Before the Court is the Petition for Writ of Habeas Corpus filed by Larry Gene Burks on April 25, 2014. (DE #1) Respondent filed a response on July 31, 2014. (DE #15) Burks replied on August 5, 2014. (DE #16) The Court appointed counsel on May 22, 2015 and directed the parties to brief why equitable tolling should not be applied in this case. (DE #23) The parties submitted their briefs, DE #27 and #30, and Respondent filed a Reply to Burks's brief on August 11, 2015, DE #31. After reviewing the parties' briefing and the available evidence, the Court finds that the current action should be dismissed.

Discussion

A Pulaski County (Arkansas) jury found Petitioner guilty of rape on March 4, 2008. (DE # 15-2) On March 13, 2008, Petitioner's trial counsel filed a Motion to be Relieved and Substitution of Counsel. (DE # 15-3) The Judgment and Commitment Order was filed on March 18, 2008. (DE #15-2) Petitioner received a thirty (30) year sentence for his rape conviction. (*Id.*).

A special judge held a hearing on April 11, 2008. It is clear from the transcript that Petitioner could no longer afford his attorney but wanted to appeal his conviction. The special judge found Petitioner indigent and granted trial counsel's motion to be relieved as counsel, but she did not enter an order appointing counsel to assist Petitioner with his direct appeal. The error is blatant from the record:

TRIAL COUNSEL: Your Honor, this is set for motion to be relieved, and just so the Court knows, we tried this case to a jury. It's one count of rape. Mr. Burks, prior to that, had been in custody for over a year and has been indigent for quite a period of time. He does wish to appeal, does not have any resources whatsoever. While he's been in jail, he's lost his home, his vehicle and has nothing for which to pay for an appeal. I was gonna ask the Court to relieve me, declare him indigent so that the Public Defender's Office can perfect his appeal.

. . .

PUBLIC DEFENDER: I don't know how it works when he's indigent and then wants to appeal. I'm not sure if we automatically pick up and appeal it, or the logistics of that, to be honest.

COURT: Okay.

PUBLIC DEFENDER: I know we generally — They're just declared indigent for an appeal transcript. I understand that [trial counsel] is not doing his appeal. He hasn't been paid to do his appeal, so I'm not exactly sure how that works.

COURT: Okay. So - - - All right. Sounds right.

MR. JONES[2]: I think we declare him indigent here, and then switching counsel takes place higher up.

COURT: I think I just was kind of on auto pilot there for a second. Mr. Burks, I'm gonna sign your affidavit of indigency declaring your [sic] indigent. I'm gonna relieve [trial counsel].

PETITIONER: Okay.

COURT: And then you've been notified of your right to appeal your jury verdict, which took place on March 4 of 2008.

PETITIONER: I have.

COURT: And then so you're declared indigent, and you can proceed with your own appeal and ask for assistance, I suppose, if you need to.

PETITIONER: Thank you.

COURT: Okay. And the Public Defender's not appointed.

Petitioner filed a Motion for Transcript and Motion for Discovery following his conviction in May 2008. (DE ## 15-5, 15-6) The court denied both motions. (DE ## 15-7, 15-8) Petitioner contends that he filed a notice of appeal, Rule 37 petition, and habeas corpus

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[2]It is not clear from the transcript who Mr. Jones is.

petition in the Pulaski County Circuit Court, but there is no record of these filings. (DE #15-10, at p. 3) When Petitioner did not hear anything after some time, he sent several letters of inquiry and complaint to various entities. Based on the record before this Court, correspondence dated back to December 2013.

Plaintiff's correspondence to the Public Defender Commission finally garnered him some attention. Based on that correspondence, the circuit court held two hearings. (DE ## 15-9, 15-10) When asked why he waited so long to inquire as to the status of his appeal and petitions, Petitioner stated that he was told in prison that the process could take some time—three to five years. Following those hearings, the circuit court found on February 12, 2014 that the Special Judge who heard the Motion to Relieve Counsel on April 11, 2008, erred when she relieved trial counsel and did not appoint a Public Defender to represent Petitioner in his appeal. (DE #15-11) The circuit court found no failure on Defendant's part and no responsibility "for the delay in filing a notice of appeal within the time allotted by the Rules of Criminal Procedure." (DE #15-11, at p. 2). The circuit court ordered the Public Defender's Office to file a Motion for Rule on Clerk pursuant to Arkansas Supreme Court Rule 2-2(b) and respectfully requested that Petitioner's appeal be docketed as timely filed pursuant to that rule. (*Id.*).

On or about February 28, 2014, the Public Defender's Office filed in the Arkansas Supreme Court a Motion Requesting a Belated Appeal and Motion Requesting Appointment of Counsel to Represent Petitioner Burks on Direct Appeal. (DE #27-1) The Arkansas Supreme Court denied the motions without opinion by formal order dated March 20, 2014.

(DE # 15-12) Petitioner filed this pro se writ of habeas corpus on April 25, 2014. (DE #1)

Discussion

A state prisoner seeking to collaterally attack his state court conviction in federal court must file a petition for habeas corpus relief within one year after the state judgment of conviction becomes final by conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A).

The trial court entered Petitioner's Judgment and Commitment Order on March 18, 2008. He had thirty days from that date, until April 18, 2008, to file a notice of appeal with the Arkansas Supreme Court. *See* Ark. R. App. P.–Crim. 2(a)(1) (criminal defendant generally has thirty days from "the date of entry of a judgment" to file an appeal). When Petitioner failed to do so, his state judgment of conviction became "final" on that day for purposes of § 2244(d)(1)(A).

The next day, April 19, 2008, the federal habeas statute of limitations began to run. One year later, on April 20, 2009, the statute of limitations expired.[3] Petitioner initiated this action on April 25, 2014, more than five years after the expiration of the limitations period. Therefore, the petition is barred by the statute of limitations unless the Court finds that equitable tolling is appropriate. "Equitable tolling is proper only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000).

[3]April 19, 2009, was a Sunday.

Section 2244(d) is a statute of limitations, not a jurisdictional bar. Accordingly, equitable tolling may apply if a petitioner can show that (1) he has been "pursuing his rights diligently," but (2) "some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland*, 560 U.S. at 653 (internal quotations and citations omitted). "The extraordinary circumstance that prevents a petitioner from timely filing his federal application must be external to the petitioner and not attributable to his actions." *Johnson v. Hobbs*, 678 F.3d 607, 611 (8th Cir. 2012) (citing *Riddle v. Kemna*, 523 F.3d 850, 857 (8th Cir. 2008) (en banc) (abrogated on other grounds by *Gonzalez v. Thaler*, 132 S.Ct. 641, 653-54 (2012)).

Here, Petitioner is not entitled to equitable tolling because he as not demonstrated that he pursued his rights diligently. *Nelson v. Norris*, 618 F.3d 886, 893 (8th Cir. 2010) (petitioner failed to pursue his rights diligently where he waited nine months after the Arkansas Supreme Court denied rehearing to file his habeas petition). The Eighth Circuit has repeatedly held that a petitioner's pro se status, lack of legal knowledge or legal resources, or any confusion about the federal limitations period or state post-conviction law, does not justify equitable tolling. *See, e.g., Johnson v. Hobbs*, 678 F.3d 607, 611 (8th Cir. 2012); *Shoemate v. Norris*, 390 F.3d 595, 597-98 (8th Cir. 2004).

The Court must take note, however, of how one error made by the trial court was compounded and derailed Petitioner's appellate proceedings. The denial of counsel, in part, led to the litany of procedural pitfalls that Petitioner encountered in this instance. After the hearing on the motion to relieve trial counsel, Petitioner was on actual notice that he did not have an attorney to represent him on appeal. While Petitioner contends that he filed a notice of appeal, Rule 37 petition, and state habeas petition, neither of those items are found in any court record. He appears to have waited until at least December 2013 to start his inquiry into the status of an appeal that is not accounted for in any court.

It is undisputed that Petitioner was constitutionally entitled to the assistance of counsel on direct appeal, *see Douglas v. California*, 372 U.S. 353 (1963), but the State of Arkansas failed him. The Pulaski County Circuit Court's special judge allowed trial counsel to withdraw without appointing new counsel to represent Petitioner, despite his desire to file a direct appeal and his lack of resources to do so. "It allowed counsel to withdraw . . . then used the ensuing procedural shortcomings to block all avenues of relief. Yet one principal reason why defendants are entitled to counsel on direct appeal is so that they will not make the kind of procedural errors that unrepresented defendants tend to commit." *Betts v. Litscher*, 241 F.3d 594, 596 (7th Cir. 2001).

The circuit court's failure to appoint counsel for Petitioner to pursue his right to a direct appeal of his criminal conviction denied him "of more than a *fair* judicial proceeding," it deprived him "of the appellate proceeding altogether." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (emphasis in original). Even after reviewing the circumstances involved, the Arkansas Supreme Court denied the motion for rule on clerk without opinion. The failure of the Arkansas Supreme Court to consider the circumstances in this case foreclosed the ability of the state trial court to correct its own mistake, and unfortunately, further undermines the public's trust in the court system.

Conclusion

Accordingly, based on the foregoing, the instant Petition should be denied and dismissed with prejudice.

Certificate of Appealability

When entering a final order adverse to the Petitioner, the Court must issue or deny a certificate of appealability. Rule 11 of the Rules Governing Section 2254 Cases in the United States District Court. The Court can issue a certificate of appealability only if Petitioner has made a substantial showing that he was denied a constitutional right. 28 U.S.C. § 2253(c)(1)-(2). Because reasonable minds could differ on the equitable tolling issue and the substantive issue of Petitioner's denial of the right to counsel on appeal, the Petitioner has provided a basis for issuing a certificate of appealability.

IT IS SO ORDERED this 23rd day of December, 2015.

UNITED STATES MAGISTRATE JUDGE

D. Order of the District Court rejecting recommended disposition.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

LARRY GENE BURKS **PETITIONER**
ADC #141354

v. **CASE NO. 5:14CV00154 BSM**

WENDY KELLEY, Director
Arkansas Department of Correction **RESPONDENT**

ORDER

The recommended disposition ("RD") submitted by United States Magistrate Judge Jerome Kearney [Doc. No. 32] and petitioner Larry Burks's objections [Doc. No. 33] have been reviewed. After a review of the entire record, the RD is rejected. Burks is entitled to equitable tolling, and his petition will proceed.

The RD correctly describes the background of this tragedy, but additional details demonstrate how injustice occurs when the judiciary gets it wrong and then refuses to correct its own mistakes. Although recounting this history crosses into the merits, understanding this background is critical because tolling is, at its core, an equitable doctrine.

The story begins when Burks was denied appellate counsel. The direct appeal of a conviction is a matter of right in Arkansas, and after Burks was convicted, he was entitled to representation by counsel if he desired to appeal. *Douglas v. California*, 372 U.S. 353, 357 (1963); *cf. Swenson v. Bosler*, 386 U.S. 258. 260 (1967) (per curiam) (indigent defendant's failure to request appellate counsel does not constitute waiver). Burks desired to appeal and he told the court of this desire – twice. As soon as nine days after his conviction, his trial counsel, in a motion to withdraw, stated that Burks desired to begin appellate proceedings "immediately." Doc. No. 15-3 ¶ 3. Twenty-nine days later and still within the thirty-day window for filing a notice of appeal, the trial court held a hearing on counsel's motion to withdraw. During that hearing, trial counsel reiterated Burks's intent. After finding Burks indigent, the judge allowed counsel to withdraw but never appointed new counsel. Burks was now without a lawyer and left alone to navigate the appellate waters with only a few days remaining to file his notice of appeal.

Despite multiple lawyers at the hearing on the motion to withdraw, no one insisted that the judge follow the Arkansas Supreme Court's direction, delivered four years prior, in a surprisingly similar case:

> [A]ppointed counsel was allowed to withdraw while the court had jurisdiction of the case, leaving a convicted defendant to fend for himself within the time allowed for a notice of appeal to be filed. It must be stressed that when the trial court relieves counsel within the thirty-day period allowed to file a notice of appeal, the court has an obligation to appoint other counsel promptly so that the convicted defendant will be represented by an attorney if he elects to proceed with a direct appeal of the judgment of conviction. If counsel is not appointed, the defendant's right to proceed with a first appeal as a matter of right is impermissibly curtailed in that the defendant has no attorney to whom he may communicate his desire to appeal so that a timely notice can be filed.

Evans v. State, 151 S.W.3d 314, 368 (Ark. 2004).

The story does not end there, however, because the judiciary continued with this awful narrative. Shortly after the window to file a notice of appeal closed, Burks asked for a copy of his trial transcript. *See* Doc. No. 15-5. In that motion, Burks referenced that he had filed a motion to vacate his conviction on May 23, 2008, based on the ineffective assistance of counsel. *Id.* This was a signed and notarized statement. *Id.* The trial court again shut Burks out – this time, to the very record he would need to support his claims. *See* Doc. No. 15-8 ("The defendant has not demonstrated a compelling need for specific documentary evidence to support an allegation in a post-conviction proceeding, and [he] is not entitled to a copy of the above-described items at public expense."). Burks could still use his memory of the proceedings, but certainly referencing the record would substantially help his argument. Surprisingly, the trial court never mentioned Burks's reference to the May 23 filing.

The Arkansas judiciary was not done with Burks. Burks believed, just as his motion referenced, that he had filed post-conviction paperwork, and he understood that appeals might take several years. Doc. No. 15-10, p. 3–4 (prison library advised Burks an appeal would take three to five years). After waiting four years for a decision, Burks inquired. He wrote letters to the Arkansas Supreme Court and the State Public Defender Commission, which apparently sparked an inquiry.

The trial court (finally) realized its error and concluded that Burks was "not responsible for the delay in filing a notice of appeal" and the lack of post-conviction review was not "[due] to any failure on the part of [Burks]." Doc. No. 15-11, p. 2 (court order). A public defender was appointed, and a request was made to the Arkansas Supreme Court to file a belated appeal. The supreme court, much like the trial court that began this travesty, denied the motion – without stating reasons and without any reference to the law. *See* Doc. No. 15-12.

It is undisputed that Burks filed this habeas petition several years after his one-year statute of limitations period had run. The State of Arkansas opposes Burks's petition and seeks to forever bar him from relief because Burks missed the deadline. This is not a case where a habeas petitioner sat on his rights and launched a hail mary in an act of desperation. Rather, this is a case that demonstrates how terribly wrong the system can become when not a single legally-trained professional speaks up as an injustice occurs. This tragedy has continued long enough, and it is time for the story to go in a new direction.

"The very nature of the writ [of habeas corpus] demands that it be administered with the initiative and flexibility essential to [e]nsure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 349 U.S. 286, 291 (1969). This is why federal courts sit in equity to decide whether the one-year statute of limitations period can be tolled. *Holland v. Florida*, 560 U.S. 631, 649–50 (2010). Equitable tolling ensures that federal review is not delayed, but also that the statute of limitations "does not impinge upon the 'vital role' that the 'writ of habeas corpus plays . . . in protecting constitutional rights' or 'close courthouse doors that a strong equitable claim would ordinarily keep open.'" 1-5 Federal Habeas Corpus Practice and Procedure § 5.2 (2015) (quoting *Holland*, 560 U.S. at 638). Burks is entitled equitable tolling if he (1) pursued his rights diligently and had (2) some extraordinary circumstances standing in his way that prevented his timely filing. *Holland*, 560 U.S. at 649.

Equitable tolling is appropriate because Burks reasonably satisfied the two-pronged analysis. The diligence required is not maximum feasible diligence, only reasonable diligence. *Anjulo-Lopez v. United States*, 541 F.3d 814, 818 (8th Cir. 2008). Here, Burks repeatedly notified the Arkansas judiciary that he wished to appeal – within nine days of his conviction and again twenty nine days later – and he filed motions to obtain the record he needed to pursue other post-conviction relief less than two months later. He explicitly stated in his motion for a copy of his transcript that he had filed a motion to vacate his sentence. When he had not heard the result of his motion, he inquired. Importantly, as soon as the Arkansas Supreme Court slammed the courthouse doors on him (again), he filed this habeas petition immediately thereafter.

Admittedly, other cases might demand more from Burks to demonstrate diligence. *See, e.g., Holland*, 560 U.S. at 653 (writing attorney numerous letters, repeatedly contacting state courts, and filing a pro se petition is reasonable); *United States v. Martin*, 408 F.3d 1089, 1095 (8th Cir. 2005) (petitioner did not have access to crucial documents to prepare petition filing complaints with state bar, motions requesting extension is reasonable). A "hard and fast adherence" to absolute legal rules, however, might result in unnecessary rigidity unable to address injustices. *Holland*, 560 U.S. at 650. The *Holland* court instructed district courts to look toward past decisions for guidance but to exercise judgment in determining whether special treatment should be afforded. *Id.* What should Burks have done to demonstrate greater diligence? Would one more letter after the trial court refused to provide transcripts suffice? Three letters? Fifteen letters? Should he have sent letters to his trial counsel – the same counsel that asked to get off the case nine days after he lost at trial – to ask for help? Should he have filed his habeas petition in federal court soon after his conviction and admit that he did not exhaust state remedies? Perhaps. When the state court failed to appoint him a lawyer, which would have significantly changed the course of events, reasonableness acquired a different definition. Burks did what he could: he notified the judiciary of his intent to appeal, told the judiciary he had filed his motion for post-conviction relief, and he waited for the judiciary to act. Under the circumstances, that is reasonable.

Burks also met the extraordinary circumstances requirement. Judicial actions or omissions have often formed the basis for equitable tolling, and there is no reason why it should not do so granted here. *See* 1-5 Federal Habeas Corpus Practice and Procedure § 5.2 (2015) n. 82 (collecting cases). Although it is questionable why no one filed Burks's notice of appeal while he still had appointed counsel, *see Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (finding the failure to file a notice of appeal per se deficient representation), the speed at which proceedings moved after he received appointed counsel reiterates why counsel is so critical. Less than three months after the trial court's hearing, the Arkansas Supreme Court decided his motion for filing a late appeal. Quickly thereafter, Burks's habeas petition was filed. It is no coincidence how quickly the justice system moved when an indigent, incarcerated person was not left to flounder on his own.

Granting equitable tolling is also in keeping with the spirit of two other habeas doctrines which, although not directly applicable here, still suggest that this equitable resolution is correct. First, federal courts must generally defer to state courts when they decide a petitioner's claims on the merits, absent extraordinary circumstances. 28 U.S.C. § 2254(d). Here, the state court took evidence and testimony to evaluate Burks's inability to appeal and the trial court was very clear on who was at fault. The court attributed no error to Burks, found that Burks was not responsible, and further found that it was the *court* that stood in the way of Burks receiving the review he deserved. Doc. No. 15-11. To find that Burks somehow sat on his rights or some extraordinary circumstance did not exist to make this a unique case would be contrary to that finding. Second, it is well established that a federal court cannot hear a habeas petition unless the petitioner first exhausted state-court remedies. 28 U.S.C. § 2254(b)(1)(A). "This exhaustion of state remedies requirement is based on the principles of comity and federalism; its purpose is to ensure that state courts are given the first opportunity to correct alleged federal constitutional errors raised by state prisoners." *Thomas v. Roy*, No. 14-1245, 2014 U.S. Dist. LEXIS 70445, at *3 (D. Minn. May 2, 2014) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *Smittie v. Lockhart*, 843 F.2d 295, 298 (8th Cir. 1988)). Here, the trial court recognized its error, but the Arkansas Supreme Court refused the opportunity to correct the federal constitutional error. Allowing this error to go unchecked, even though everyone involved seems to agree that it occurred, defies logic and perpetuates injustice.

It is universally acknowledged that Burks was improperly denied counsel. Br. Concerning Appl. Equitable Tolling 6, Doc. No. 27 ("Respondent does not dispute that the special judge committed an error in 2008 when she did not appoint Burks counsel to pursue an appeal after she declared him indigent and he had expressed his desire to appeal."). Despite the state court's involvement in perpetuating this injustice – which, it cannot reasonably deny – the State of Arkansas now points to Burks and demands that he follow the rules. *Cf. Dretke v. Haley*, 541 U.S. 386, 398 (2004) (J. Stevens, dissenting) ("That the State has decided to oppose the grant of habeas relief in this case, even as it concedes that respondent has already served more time in prison than the law authorized, might cause some to question whether the State has forgotten its overriding obligation to serve the cause of justice." (internal quotations omitted)). That outcome, however, is contrary to the purpose of equitable tolling, which is certainly not appropriate under this set of facts.

Under these facts, equitable tolling is appropriate. Justice demands more than simply requiring Burks to write a few more letters from his jail cell. Accordingly, the RD is rejected because equitable tolling applies, and the petition is referred back to Judge Kearney for further disposition.

IT IS SO ORDERED this 11th day of April 2016.

Brian S. Miller

UNITED STATES DISTRICT JUDGE

E. Recommended disposition granting equitable tolling.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

LARRY GENE BURKS
ADC #141354 PETITIONER

v. CASE NO. 5:14-cv-00154-BSM-JTK

WENDY KELLEY[1], Director
Arkansas Department of Correction RESPONDENT

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION INSTRUCTIONS

The following recommended disposition has been sent to United States District Court Chief Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the United States

[1]Wendy Kelley replaced Ray Hobbs as Director of the Arkansas Department of Correction. Under Federal Rule of Civil Procedure 25(d), Wendy Kelley is automatically substituted as Respondent in this matter.

District Judge, you must, at the same time that you file your written objections, include a "Statement of Necessity" that sets forth the following:

1. Why the record made before the Magistrate Judge is inadequate.

2. Why the evidence to be proffered at the requested hearing before the United States District Judge was not offered at the hearing before the Magistrate Judge.

3. An offer of proof setting forth the details of any testimony or other evidence (including copies of any documents) desired to be introduced at the requested hearing before the United States District Judge.

From this submission, the United States District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A 149
Little Rock, AR 72201-3325

Introduction

On December 23, 2015, the undersigned recommended that Petitioner's writ of habeas corpus be denied and dismissed with prejudice and that a certificate of appealability be granted. (Doc. No. 32) The district court rejected the recommended disposition, determining that equitable tolling applies, and referred this matter back to the undersigned for further disposition. (Doc. No. 34) Applying equitable tolling to this matter, the Court finds that the petition should be granted.

The facts are sufficiently outlined in the undersigned's recommended disposition and the district judge's order rejecting the recommended disposition. Therefore, there is no need to provided them again here.

Petitioner was improperly denied counsel in this matter, and it is undisputed that he was constitutionally entitled to the assistance of counsel on direct appeal. *Douglas v. California*, 372 U.S. 353 (1963); *Hanson v. Passer*, 13 F.3d 275, 278 (8th Cir. 1994). The circuit court's failure to appoint counsel for Petitioner to pursue his right to a direct appeal of his criminal conviction denied him "of more than a *fair* judicial proceeding," it deprived him "of an appellate proceeding altogether." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (emphasis in original).

"The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical state of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984). The Eighth Circuit has only "rarely . . . found a situation that justifies application of the presumption of prejudice.'" *Raymond v. Weber,* 552 F.3d 680, 684 (8th Cir. 2009) (citing *Freeman v. Graves*, 317 F.3d 898, 900-01 (8th Cir. 2003) (internal citations omitted)). "[O]n petition for writ of habeas corpus by state prisoners, errors of the state trial court are not reviewable on federal habeas corpus unless there has been a deprivation of constitutional rights such as to render the judgment void or to amount to a denial of due process." *Scalf v. Bennett*, 408 F.2d 325, 327 (8th Cir. 1969). "Habeas corpus relief on the ground of incompetency of counsel or denial of effective counsel will be granted 'only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation.'" *Id.* (citing *White v. McHam*, 386 F.2d 817, 818 (5th Cir. 1967); *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1965); *Maye v. Pescor*, 162 F.2d 641, 643 (8th Cir. 1947)).

For the reasons stated herein,

IT IS HEREBY RECOMMENDED THAT Petitioner's petition for writ of habeas corpus be GRANTED. Because his constitutional right to assistance of counsel on direct appeal was violated, his state conviction should be vacated and set aside. The State may retry Petitioner on the charges at its election but must do so within 120 days of the entry of the district judge's opinion and judgment. This Order is stayed should either party file an appeal. The stay remains in effect with regard to any appeal until issuance of the Eighth Circuit Court of Appeals mandate.

IT IS SO ORDERED this 14th day of April, 2016.

UNITED STATES MAGISTRATE JUDGE

F. Order granting recommended disposition and equitable tolling

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

LARRY GENE BURKS **PETITIONER**
ADC #141354

v. **CASE NO. 5:14-CV-00154 BSM**

WENDY KELLEY, Director,
Arkansas Department of Correction **RESPONDENT**

ORDER

The recommended disposition ("RD") submitted by United States Magistrate Judge Jerome Kearney [Doc. No. 35] and respondent Wendy Kelley's objections [Doc. No. 36] have been reviewed. The RD recommends vacating Petitioner Larry Gene Burks's conviction, while Kelley argues this remedy is excessive because it does not provide the state with another opportunity to provide Burks with a counseled appeal. *See* Doc. No. 36.

Although the RD is correct that a constitutional violation occurred, automatically vacating Burks's conviction is not the only remedy. Federal courts have "broad discretion in conditioning a judgment granting habeas relief" and may dispose of habeas cases "as law and justice require." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (interpreting 28 U.S.C. § 2243). Vacating a conviction and ordering a prisoner's release may be conditioned on a state's refusal to correct the wrong. *See, e.g., Engresser v. Dooley*, No. 5:10-CV-05039 (D.S.D. Dec. 7, 2011); *Keyes v. Renico*, No. 05-CV-71160, 2005 U.S. Dist. LEXIS 19132 (E.D. Mich. Sep. 2, 2005). "Conditional [writs] are essentially accommodations accorded to the state. They represent a [habeas] court's holding that a[n] . . . infirmity justifies petitioner's release. The conditional nature of the order provides the state with a window of time within which it might cure the . . . error." *Phifer v. Warden*, 53 F.3d 859, 864–65 (7th Cir. 1995). The Supreme Court has recognized conditional writs for constitutional violations on appeal. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 403 (1984) (affirming judgment after district court granted conditional writ when petitioner received ineffective assistance of appellate counsel); *Dowd v. United States*, 340 U.S. 206, 209–210 (1951) (directing district court to enter conditional writ to allow state to accept petitioner's appeal).

Rather than entering judgment on the writ, the State of Arkansas will be given another opportunity to provide Burks with a counseled appeal. Within 120 days, the State of Arkansas shall appoint Burks appellate counsel, accept his request for an appeal, and consider the appeal as having been timely filed, or vacate his convictions and re-try him. The state is directed to file a status report within 120 days advising as to whether these conditions have been met. Should the state fail to comply, Burks's petition will be granted in total and his convictions will be vacated.

The clerk is directed to stay this case pending further action.

IT IS SO ORDERED this 27th day of June 2016.

Brian S. Miller
UNITED STATES DISTRICT JUDGE

G. Order denying Respondent's motion to alter or amend

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

LARRY GENE BURKS **PETITIONER**
ADC #141354

v. **CASE NO. 5:14-CV-00154 BSM**

WENDY KELLEY, Director,
Arkansas Department of Correction **RESPONDENT**

ORDER

Respondent Wendy Kelley's motion to alter or amend judgment [Doc. No. 38] is denied.

It is undisputed that petitioner Larry Burks filed his habeas corpus petition several years after the one-year statute of limitations period had run. It is also undisputed that Burks was denied counsel on appeal, despite Burks notifying the Arkansas trial court of his indigency and requesting the opportunity to appeal within the time for doing so. *See, e.g,* Respt's Br Concerning Appl. Equitable Tolling 1, Doc. No. 27 (trial judge finding Burks indigent and not appointing counsel). After Burks was granted equitable tolling, *see* Doc. No. 34, the magistrate judge recommended that Burks's petition be granted because he was not provided a counseled appeal after requesting one, *see* Doc. No. 35. Kelley objected and asked that the State of Arkansas be provided an opportunity to provide that counseled appeal. *See* Doc. No. 36. Before deciding whether to adopt the recommended disposition and enter judgment, Kelley's request was granted, and the state was given 120 days to provide a counseled appeal. *See* Doc. No. 37. The case was stayed pending a status report of the state's progress. *Id.* Now, Kelley moves to alter or amend judgment pursuant to Federal

Rule of Civil Procedure 59(e). *See* Doc. No. 38.

As an initial matter, it is unclear what Kelley is asking to have reconsidered. She argues that equitable tolling was incorrectly granted because of a misunderstanding of facts or a misapplication of law. *See* Doc. No. 38. The order granting equitable tolling [Doc. No. 34], however, was docketed on April 11, 2016 – over 100 days before the state's motion. Kelley never mentioned this misunderstanding or misapplication in her objections to the magistrate judge's recommendation on the writ. *See generally,* Doc. No. 36.

To make matters more confusing, no judgment has been entered, yet Kelley brings this motion as one to "alter or amend judgment" pursuant to Rule 59(e). Rule 59(e) is not proper for non-final orders. *See Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999). Although Kelley characterizes the order providing the state with an opportunity to provide an appeal as "conditionally granting Burks a writ of habeas corpus[,]" that order did no such thing. The order was clear: "*Rather than entering judgment on the writ*, the State of Arkansas will be given another opportunity to provide Burks with a counseled appeal." Doc. No. 37 (emphasis added). Furthermore, Rule 58(a) requires that "[e]very judgment and amended judgment must be set out in a separate document[.]" No judgment appears on the docket sheet. Indeed, the magistrate judge's recommended disposition remains pending.

Kelley could have been mistaken and intended a Rule 60(b) motion, which is akin to reconsidering non-final orders. *Elder-Keep v. Aksamit*, 460 F.3d 979, 984 (8th Cir. 2006); *Broadway*, 193 F.3d at 989 ("This motion was not directed to a final judgment, but rather to a nonfinal order. By its terms, only Rule 60(b) encompasses a motion filed in response to an order."). The purpose of Rule 60(b) motions is not to provide parties with another opportunity to re-argue their case. *United States v. Young*, 803 F.2d 805, 806 (8th Cir. 1986) (per curium). Rather, the rule outlines specific instances when such motions are proper: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied; (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b)(1)–(6). Kelley did not argue fraud, and since there has been no judgment, only options one, two, and six are available. As discussed below, the motion is denied because none of these options is grounds for reconsideration.

Rule 60(b)(1) for mistake, inadvertence, surprise, or excusable neglect does not apply. Kelley argues that the court mistakenly accepted Burks's assertion that he filed a motion to vacate his conviction in state court. Doc. No. 38 at 2. Rule 60(b)(1), however, applies to a party's mistake, not the court's mistake. *Fox v. Brewer*, 620 F.2d 177, 180 (8th Cir. 1980); *Tylon v. City of Chicago*, 97 Fed. Appx. 680 (7th Cir. 2004).

Rule 60(b)(2) is not applicable because Kelley's evidence is not newly discovered. She provided a docket sheet to apparently demonstrate that Burks never filed a motion for post-conviction relief. This docket sheet was available during briefing and was not newly discovered, and it merely reiterates what already existed in the record.

Finally, the catch-all provision of Rule 60(b)(6), "any other reason that justifies relief," does not apply. Kelley's motion comes over three months after equitable tolling was granted, points to an exhibit that existed during briefing, and adds little to the record. The motion misunderstands the equitable tolling order as being "premised" on Burks's motion to vacate his conviction, when the order was clear that the accumulation of the state's failures, combined with questionable procedures, resulted in an inexcusable constitutional error. Although it is sufficient to deny reconsideration on that point, elaboration is required because Kelley's motion underscores the gravity of the constitutional error at issue.

The order granting equitable tolling recapped the multiple failures in the Arkansas court system and the reasonableness of Burks's actions. Burks repeatedly notified the Pulaski County Circuit Court of his desire to appeal – first within nine days of his conviction and again twenty nine days later. Although there is some debate on whether Burks mailed a motion to vacate his conviction or it was just not filed, Burks did what he could reasonably do under the circumstances. The "new" docket sheet makes this point blatantly clear.

Following Burks's conviction, his trial lawyer asked to withdraw. A hearing was held on April 11, 2008 – still within the period for filing an appeal. The docket entries for that hearing show that Burks's lawyer was relieved, and there was an order appointing new counsel. Doc. No. 38-1 at 20. This contradicts the trial transcript, however, which shows the court believing counsel was appointed somewhere else and ending the hearing by stating "[p]ublic [d]efender's [sic] not appointed." It was not until the Circuit Court held a hearing several years later that the court realized:

> [The] Special Judge signed the Defendant's Affidavit of Indigency and Order Appointing Counsel [on] that date, [but] a Public Defender was not appointed for the Defendant. The Special Judge initially noted on the docket sheet that a public defender would be appointed, *but then crossed out that notation*. The transcript indicates that the Special Judge believed in error that a substitution of counsel "takes place higher up." The Special Judge stated that "the Public Defender's not appointed.

> . . .
>
> Relieving Defendant's counsel and failing to appoint a public defender in 2008 was error on the part of this Court not owing to any failure on the part of the Defendant. The Defendant is not responsible for the delay in filing a notice of appeal within the time allotted by the Rules of Criminal Procedure.
>
> . . .
>
> This Court respectfully requests that the Defendant's appeal be docketed as timely filed pursuant to that rule.

Doc. No. 15-11 ¶ 3, 5–6 (emphasis added). Based on these flawed procedures, it was reasonable for Burks to believe that he either (a) had been appointed counsel (as the docket sheet reflects) or (b) new counsel would be appointed after that hearing by someone "higher up" (as the transcript reflects). While Kelley argues that Burks should have done more to pursue his rights, it was reasonable for Burks to believe that his appellate counsel – which was either appointed at the hearing or would have been appointed "higher up" – was actively appealing his conviction. The delay in following up with the Arkansas Supreme Court, therefore, cannot be attributed to Burks sitting on his rights, but on a reasonable understanding of what should have occurred. Notably, after the Circuit Court recognized that Burks was not at fault for the error and the Arkansas Supreme Court denied Burks's petition for a belated appeal, Burks filed his petition for a writ of habeas corpus less than two months later. Under these circumstances, equitable tolling was appropriate.

Moreover, Kelley was given what she requested: *another* opportunity to provide a counseled appeal. But even after being granted what she sought, Kelley apparently continues to fight, even though the State of Arkansas admitted that Burks's constitutional right to counsel was violated.

The motion for reconsideration is denied. There was no misunderstanding or misapplication of the law. The 120 day stay remains in effect pursuant to the June 27, 2016 order. *See* Doc. No. 37.

IT IS SO ORDERED this 22nd day of August 2016.

Brian S. Miller

UNITED STATES DISTRICT JUDGE

H. Order of the Pulaski Circuit Court recommending grant of belated appeal

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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FOURTH DIVISION

STATE OF ARKANSAS PLAINTIFF

VS. CR 2007-1193

LARRY BURKS DEFENDANT

ORDER

Comes now for consideration the evidence and testimony introduced at the hearing on February 10, 2014 in this case, and based upon a review of the file and records of the case, the Court DOTH FIND:

1. The Defendant was tried by a jury and convicted of one count of rape on March 4, 2008. He received a sentence of thirty years in the Arkansas Department of Corrections.

2. On March 14, 2008, The Defendant's trial attorney, Mark Leverett, filed a motion to be relieved as counsel. At a hearing held April 11, 2008, the Special Judge sitting for this court granted defense that motion.

3. Though that Special Judge signed the Defendant's Affidavit of Indigency and Order Appointing Counsel that date, a Public Defender was not appointed for the Defendant. The Special Judge initially noted on the docket sheet that a public defender would be appointed, but then crossed out that notation. The transcript of the April 11, 2008 hearing indicates that the Special Judge believed in error that a substitution of counsel "takes place higher up." The Special Judge stated that "the Public Defender's not appointed."

4. The Defendant was appointed a public defender by this Court at the hearing held on January 23, 2014.

5. Relieving Defendant's counsel and failing to appoint a public defender in 2008 was error on the part of this Court not owing to any failure on the part of the Defendant. The Defendant is not responsible for the delay in filing a notice of appeal within the time allotted by the Rules of Criminal Procedure.

THEREFORE, the Public Defender's Office is hereby ordered to file a Motion for Rule on the Clerk pursuant to Supreme Court Rule 2-2(b), submitting this Order admitting error as an exhibit. This Court respectfully requests that the Defendant's appeal be docketed as timely filed pursuant to that rule.

IT IS SO ORDERED.

HERBERT T. WRIGHT – CIRCUIT JUDGE

2-12-14

DATE

I. Order of Arkansas Supreme Court denying belated appeal

FORMAL ORDER

STATE OF ARKANSAS,	)	
	)	**SCT.**
SUPREME COURT	)	

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON MARCH 20, 2014, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CR-14-202

LARRY GENE BURKS APPELLANT

V. APPEAL FROM PULASKI COUNTY CIRCUIT COURT – FOURTH DIVISION

(NO. CR2007-1193)

STATE OF ARKANSAS APPELLEE

APPELLANT'S MOTION REQUESTING A BELATED APPEAL AND MOTION REQUESTING APPOINTMENT OF COUNSEL TO REPRESENT ON DIRECT APPEAL IS DENIED.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, LESLIE STEEN, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 20TH DAY OF MARCH, 2014.

Leslie W. Steen

CLERK

BY: ______________________________

DEPUTY CLERK

ORIGINAL TO CLERK

CC: CLINT MILLER
LARRY GENE BURKS
DAVID RAUPP, SENIOR ASS'T ATTORNEY GENERAL
HON. HERBERT T. WRIGHT, CIRCUIT JUDGE

J. Hearing in which trial counsel was relieved

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

FOURTH DIVISION

STATE OF ARKANSAS, PLAINTIFF,

VS. NO. CR-2007-1193

LARRY GENE BURKS, DEFENDANT.

MOTION HEARING

BE IT REMEMBERED, that on the 11th day of April, 2008, the same being a day of the regular March, 2008, Term of the Pulaski Circuit Court, Fourth Division, before the Honorable Lindsey Sloan, Special Judge of said Court, this cause came on to be heard, the State being represented by the Honorable Will Jones, Deputy Prosecuting Attorney, the Defendant being represented by the Honorable Mark Leverett. THEREUPON, the following proceedings were had and done, as follows:

THE CLERK: CR-2007-1193, LARRY BURKS.

MR. LEVERETT: Good morning, Your Honor.

THE COURT: Good morning.

MR. LEVERETT: Your Honor, this is set for motion to be relieved, and just so the Court knows, we tried this case to a jury. It's one count of rape.

Mr. Burks, prior to that, had been in custody for over a year and has been indigent for quite a period of time. He does wish to appeal, does not have any resources whatsoever. While he's been in jail, he's lost his home, his vehicle and has nothing for which to pay for an appeal. I was gonna ask the Court to relieve me, declare him indigent so that the Public Defender's Office can perfect his appeal.

THE COURT: Has he visited with the Public Defender yet?

MR. LEVERETT: Not to this point.

THE COURT: To your knowledge?

MR. LEVERETT: No.

THE COURT: Okay. I'm gonna need to -- I believe this is what Judge Langston would do, so this is what I'm gonna try and do. He can visit with the Public Defender here, and if he can sign an affidavit and they can okay that, then we'll call you back up.

MR. LEVERETT: Sure. Thank you.

THE COURT: Okay. Thanks.

MR. LEVERETT: All right. Thank you.

(THEREUPON, the Court went off the record for a time, and then in Open Court, the proceedings continued, as follows:)

THE CLERK: CR-2007-1193, LARRY BURKS.

(THEREUPON, the Defendant was sworn by Bailiff John Martin.)

QUESTIONS BY THE COURT:

Q All right. Mr. Burks, I have now an affidavit of indigency that appears to bear your signature. Is everything on that true and correct, sir?

A It is.

Q And that's your signature, sir?

A That's my signature.

THE COURT: I see the Public-- Is this the Public Defender's Office standing by Mr. Leverett?

MISS JACKSON: Yes, Your Honor.

THE COURT: Okay. Have you gone over this with Mr. Burks?

MISS JACKSON: I have.

THE COURT: And you agree that it's appropriate?

MISS JACKSON: I still don't-- I believe that that's correct. I'm not sure this is the way that we generally handle it.

THE COURT: Okay.

MISS JACKSON: I don't know how it works when he's indigent and then wants to appeal. I'm not sure if we automatically pick it up and appeal it, or the logistics of that, to be honest.

THE COURT: Okay.

MISS JACKSON: I know we generally --They're just declared indigent for an appeal transcript. I understand that Mr. Leverett is not doing his appeal. He hasn't been paid to do his appeal, so I'm not exactly sure how that works.

THE COURT: Okay. So--- All right. Sounds right.

MR. JONES: Your Honor, I'm thinking that this kind of takes place at the next level.

THE COURT: Yeah, I think so, too.

MR. JONES: I think we declare him indigent here, and then switching counsel takes place higher up.

THE COURT: I think I just was kind of on auto pilot there for a second. Mr. Burks, I'm gonna sign your affidavit of indigency declaring your indigent. I'm gonna relieve Mr. Leverett.

THE DEFENDANT: Okay.

THE COURT: And then you've been notified of your right to appeal your jury verdict, which took place on March 4 of 2008.

THE DEFENDANT: I have.

THE COURT: And then so you're declared indigent, and you can proceed with your own appeal and ask for assistance, I suppose, if you need to.

THE DEFENDANT: Thank you.

THE COURT: Okay. And the Public Defender's not appointed.

MISS JACKSON: Okay.

THE COURT: Thank you.

MR. LEVERETT: Thank you, Your Honor. May I be excused?

THE COURT: Yes, sir.

(THEREUPON, the case of the State of Arkansas versus Larry Burks was concluded.)

CERTIFICATE

I, Patricia S. Toland, Official Court Reporter, for the Pulaski Circuit Court, Fourth Division, Sixth Judicial District, hereby certify that I recorded the proceedings by Stenotype in the case of the State of Arkansas versus Larry Burks, Pulaski County Circuit No. CR-2007-1193, April 11, 2008, before the Honorable Lindsey Sloan, Special Pulaski County Circuit Judge, Judge thereof, at Little Rock, Arkansas; that said recording has been reduced to a transcription by me, and the foregoing pages, numbered 1 through 6, constitute a true and correct transcript of the proceedings held to the best of my ability.

WITNESS MY HAND AND SEAL as such Court Reporter on this 21st day of July, 2014.

Pat Toland

Patricia S. Toland
Supreme Court Certified Reporter
No. 149

Cost: $ 24.60