

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

GREGORY DICKENS, JR.,)	
)	
Petitioner,)	
)	
vs.)	CAUSE NO. 1:14-CV-117
)	
SUPERINTENDENT,)	
)	
Respondent.)	

OPINION AND ORDER

This matter is before the Court on the Petition under 28 U.S.C. Paragraph 2254 for Writ of Habeas Corpus by a Person in State Custody filed by Gregory Dickens, Jr., a *pro se* prisoner, on April 14, 2014. For the reasons set forth below, the court **DISMISSES** this habeas corpus petition because it is untimely and **DENIES** a certificate of appealability.

BACKGROUND

Gregory Dickens, Jr., is challenging his conviction and his sentence of Life Without Parole for murder by the St. Joseph Superior Court under cause number 71D01-9708-CF-375 on July 9, 1999. Dickens filed a direct appeal to the Indiana Supreme Court which affirmed the trial court on August 28, 2001. He did not file a petition for certiorari with the United States Supreme Court and the deadline for doing so expired on November 26, 2001. He filed a post-conviction relief petition on August 21, 2011, which was denied. The Court of Appeals of Indiana affirmed and the Indiana

Supreme Court denied transfer on January 17, 2014. He did not file a petition for certiorari with the United States Supreme Court. This petition was signed and mailed on April 7, 2014.

DISCUSSION

Pursuant to 2254 Habeas Corpus Rule 4, the Court must review a habeas corpus petition and dismiss it if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief" Because this petition is untimely, it must be dismissed.

Habeas Corpus petitions are subject to a strict one year statute of limitations.

(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).

Question 16 on the habeas corpus form asked Dickens to explain why the petition was timely. In response he wrote, "There is a total of five issues presented in this filing. The Indiana Supreme Court has been afforded the opportunity to rule on the issues. This Petition is timely because it meets all State and Federal statutes concerning this type of Petition." DE 1 at 5. Dickens does not mention (and nothing in this petition indicates) that state action prevented him from filing this habeas corpus petition sooner or that the petition is based on a newly recognized Constitutional right. Therefore §§ 2244(d)(1)(B) and (C) are not applicable to this case.

In Ground 3, Dickens argues that, "The Court of Appeals erred in affirming the post-conviction court's legally flawed analysis of Dickens' newly discovered evidence claim." DE 1 at 9. The newly discovered evidence that Dickens claims to have found is "a report issued by the National Research Counsel ("NRC"), which was completed in 2004, establish[ing] that the previously accepted and relied upon comparative bullet lead analysis ("CBLA") conducted by the FBI was unreliable." *Dickens v. State*, 997 N.E.2d 56, 60 (Ind. Ct. App. 2013). Dickens argues that in light of the NRC report,

"the testimony of the FBI employee and a related witness would not be admissible under current scientific understanding" DE 1 at 9. However, the NRC report is not the "factual predicate" of a claim as required by 28 U.S.C. § 2244(d)(1)(D) because "a factual predicate must consist of facts. Conclusions drawn from preexisting facts, even if the conclusions are themselves new, are not factual predicates for a claim." *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012). Here, the facts supporting his claim are the bullets on which the comparative lead analysis was performed. They were available even before his trial and were not newly discovered. The NRC report is not a fact. Rather it is a study explaining how to interpret facts like those that were presented during Dickens' trial. At best this is corroborating evidence. However, "[s]ection 2244(d)(1)(D) does not restart the time when corroborating evidence becomes available; if it did, then the statute of limitations would fail in its purpose to bring finality to criminal judgments, for any prisoner could reopen the judgment by locating any additional fact." *Escamilla v. Jungwirth*, 426 F.3d 868, 871 (7th Cir. 2005). Therefore 2244(d)(1)(D) is not applicable to this case.

Thus, pursuant to § 2244(d)(1)(A), the 1-year period of limitation began when the judgment became final upon the expiration of the time for seeking direct review when the deadline for filing a petition for certiorari with the United States Supreme Court expired on November 26, 2001. See Sup. Ct. R. 13(1) and *Gonzalez v.*

Thaler, 565 U.S. ___, ___; 132 S. Ct. 641, 653-54; 181 L. Ed. 2d 619, 636 (2012). (“[T]he judgment becomes final . . . when the time for pursuing direct review . . . expires.”). Consequently, the last day that he could have filed a timely habeas corpus petition was one year later, on November 26, 2002.

28 U.S.C. § 2244(d)(2) tolls the 1-year period of limitation during the pendency of a post-conviction relief petition. However, that provision is not applicable to this case because the allowable time for filing a habeas corpus petition had long since passed by the time that Dickens filed his post-conviction relief petition on August 21, 2011. Therefore this habeas corpus petition (which was signed on April 7, 2014) is untimely and must be dismissed.

Finally, pursuant to Rule 11 of the Rules Governing Section 2254 Cases, the court must consider whether to grant a certificate of appealability. When the court dismisses a petition on procedural grounds, the determination of whether a certificate of appealability should issue has two components. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). First, the petitioner must show that reasonable jurists would find it debatable whether the court was correct in its procedural ruling. *Id.* at 484. If the petitioner meets that requirement, then he must show that reasonable jurists would find it debatable whether the petition states a valid claim for the denial of a constitutional right. *Id.* As previously explained, this petition is untimely. Because there is no basis for

finding that jurists of reason would debate the correctness of this procedural ruling or find a reason to encourage him to proceed further, a certificate of appealability must be denied.

CONCLUSION

For the reasons set forth above, the court **DISMISSES** this habeas corpus petition because it is untimely and **DENIES** a certificate of appealability.

DATED: May 6, 2014

/s/RUDY LOZANO, Judge
United State District Court