

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

BARNEY DWAYNE EBAY, #02155147

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§
§

VS.

CIVIL ACTION NO. 4:19cv259

DIRECTOR, TDCJ-CID

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Kimberly C. Priest Johnson, who issued a Report and Recommendation concluding that the petition for writ of habeas corpus should be denied and dismissed with prejudice. Petitioner has not filed any objections within the time permitted for objections.

Respondent filed objections (Dkt. # 46). Respondent objected to the Magistrate Judge’s finding that Petitioner’s claims are timely despite Petitioner’s valid waiver of his right to appeal his conviction. Respondent reasserts that Petitioner, “who expressly waived his right to appeal pursuant to a plea deal, had one year from the date his judgment was entered, absent any statutory tolling” (Dkt. # 46, p. 2). Respondent wishes to preserve this issue for appeal should an appeal be sought, noting the District Courts are split on the issue regarding when a judgment becomes final when a petitioner expressly waives his right to appeal, and that the issue has been raised in a case currently pending before the Fifth Circuit Court of Appeals. *See Trevino v. Lumpkin*, CIV.A. SA-19-CA-0352-DAE, 2020 WL 2812571 (W.D. Tex. May 29, 2020), *appeal docketed*, No. 20-50535 (5th Cir. June 30, 2020).

The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Having made a *de novo* review of the objections raised by the Respondent to the Report, the Court

concludes that the findings and conclusions of the Magistrate Judge are correct. Therefore, the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court.

It is accordingly **ORDERED** the petition for a writ of habeas corpus is **DENIED** and the case is **DISMISSED** with prejudice. It is further **ORDERED** that Petitioner be **DENIED** a certificate of appealability *sua sponte*.

It is further **ORDERED** that all motions not previously ruled on are hereby **DENIED**.

SIGNED this 7th day of January, 2022.


AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE