Horton v. Livingston Doc. 4

## IN THE UNITED STATES DISTRICT COURT

## FOR THE EASTERN DISTRICT OF TEXAS

## **LUFKIN DIVISION**

CHARLES EDWARD HORTON 

VS. 

CIVIL ACTION NO. 9:16-CV-72

DIRECTOR, TDCJ-CID

## MEMORANDUM ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Charles Edward Horton, proceeding through counsel, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommends dismissing the petition as barred by the statute of limitations.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record and the pleadings. No objections to the Report and Recommendation of United States Magistrate Judge were filed by the parties.

In this case, the petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362

F.3d 323, 328 (5th Cir. 2004); see also Barefoot v. Estelle, 463 U.S. 880, 893 (1982). In making that

substantial showing, the petitioner need not establish that he should prevail on the merits. Rather,

he must demonstrate that the issues are subject to debate among jurists of reason, that a court could

resolve the issues in a different manner, or that the questions presented are worthy of encouragement

to proceed further. See Slack, 529 U.S. at 483-84; Avila v. Quarterman, 560 F.3d 299, 304 (5th Cir.

2009). If the petition was denied on procedural grounds, the petitioner must show that jurists of

reason would find it debatable: (1) whether the petition raises a valid claim of the denial of a

constitutional right, and (2) whether the district court was correct in its procedural ruling. Slack, 529

U.S. at 484; Elizalde, 362 F.3d at 328. Any doubt regarding whether to grant a certificate of

appealability is resolved in favor of the petitioner, and the severity of the penalty may be considered

in making this determination. See Miller v. Johnson, 200 F.3d 274, 280-81 (5th Cir. 2000).

Here, the petitioner has not shown that any of the issues raised by his claims are subject to

debate among jurists of reason, or that a procedural ruling was incorrect. In addition, the questions

presented are not worthy of encouragement to proceed further. Petitioner has failed to make a

sufficient showing to merit the issuance of a certificate of appealability.

Accordingly, the findings of fact and conclusions of law of the magistrate judge are correct,

and the report of the magistrate judge (document no. 3) is **ADOPTED**. A final judgment will be

entered in this casein accordance with the magistrate judge's recommendation. A certificate of

appealability will not be issued.

SIGNED this 3rd day of August, 2016.

MICHAEL H. SCHNEIDER

UNITED STATES DISTRICT JUDGE

chal HChnila