

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

AUSTIN DIVISION

DARNELL DELK,
Petitioner,

V.

RICK THALER,
Director, Texas Dept. of Criminal Justice-
Correctional Institutions
Division,
Respondent.

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A-10-CA-171-SS

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

To: The Honorable Sam Sparks, United States District Judge

The Magistrate Judge submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. §636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates, as amended, effective December 1, 2002.

Before the Court are Petitioner's Application for Habeas Corpus Relief under 28 U.S.C. § 2254 (Document 1) and Petitioner's memorandum in support (Document 2). Petitioner, proceeding pro se, has paid the appropriate filing fee. For the reasons set forth below, the undersigned finds that Petitioner's application for writ of habeas corpus should be dismissed.

I. STATEMENT OF THE CASE

A. Petitioner's Criminal History

According to Petitioner, the Director has custody of him pursuant to a judgment and sentence of the 331st Judicial District Court of Travis County, Texas. Petitioner was convicted of aggravated robbery with a deadly weapon and was sentenced to 90 years in prison on June 18, 1985. Petitioner's conviction was affirmed on July 23, 1986. Delk v. State, No. 03-85-00173-CR (Tex. App. – Austin 1986). The Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review on November 12, 1987. Delk v. State, PD No. 0976-86.

Petitioner has also challenged his conviction in five state applications for habeas corpus relief. The first application was denied by the Texas Court of Criminal Appeals on August 22, 1990. Ex parte Delk, Appl. No. 21,415-01. The second was denied on February 27, 1991. Id. at 21,415-02. The third was dismissed as non-compliant on October 20, 2004. Id. at 21,415-03. The fourth was dismissed as successive on September 14, 2005. Id. at 21,415-04. The fifth was also dismissed as successive on February 10, 2010. Id. at 21,415-06.

B. Petitioner's Grounds for Relief

Petitioner raises the following grounds for relief:

1. The trial court allowed the prosecutor to instruct the jury to give Petitioner more time for extraneous offenses;
2. The trial court erred in appointing trial counsel to represent Petitioner on appeal;
3. Petitioner was tried in jail clothes;
4. Petitioner was tried by an all white jury; and
5. Petitioner received ineffective assistance of counsel.

II. DISCUSSION AND ANALYSIS

A. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) establishes a one-year statute of limitations for state inmates seeking federal habeas corpus relief. See 28 U.S.C. § 2244(d). That section provides, in relevant part:

(d)(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.

B. Application

Petitioner’s conviction became final prior to the enactment of the AEDPA on April 24, 1996. Thus, absent any tolling, Petitioner had until April 24, 1997, to file an application for federal habeas relief. Smith v. Ward, 209 F.3d 383, 384 (5th Cir. 2000); Flanagan v. Johnson, 154 F.3d 196, 200-02 (5th Cir. 1998).

Petitioner’s first two state applications for habeas corpus relief did not operate to toll the grace period, because they were filed and denied before the AEDPA was enacted. Petitioner’s third application for habeas corpus relief was not properly filed and did not toll the limitations period. An

application for state post-conviction relief is “properly filed” for purposes of 28 U.S.C. § 2244(d)(2) “when its delivery and acceptance are in compliance with the applicable [state] laws and rules governing filings.” Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361, 364 (2000). See also Villegas v. Johnson, 184 F.3d 467, 470 (5th Cir. 1999) (state habeas application “properly filed” when it conforms with state’s applicable procedural filing requirements such as those governing time and place of filing). Petitioner’s state habeas corpus application did not constitute a “properly filed” application for purposes of 28 U.S.C. § 2244(d)(2), because the Texas Court of Criminal Appeals determined the application failed to comply with TEX. R. APP. P. 73.2. Edwards v. Dretke, 116 Fed. Appx. 470, 471 (5th Cir. 2004). Petitioner’s fourth and fifth state applications also did not toll the grace period, because they were filed after the grace period had already expired. Scott v. Johnson, 227 F.3d 260, 263 (5th Cir. 2000).

The record does not reflect that any unconstitutional state action impeded Petitioner from filing for federal habeas corpus relief prior to the end of the one-year grace period. Furthermore, Petitioner has not shown that he did not know the factual predicate of his claims earlier. Finally, the claims do not concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review.

III. RECOMMENDATION

It is recommended that Petitioner’s application for writ of habeas corpus be dismissed as time-barred.

IV. CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding “unless a circuit justice or judge issues a certificate of appealability.” 28 U.S.C.

§ 2253(c) (1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a “substantial showing of the denial of a constitutional right” in Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000). In cases where a district court rejected a petitioner’s constitutional claims on the merits, “the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” Id. “When a district court denies a habeas petition on procedural grounds without reaching the petitioner’s underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Id.

In this case, reasonable jurists could not debate the dismissal of the Petitioner’s section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029 (2003) (citing Slack, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court shall not issue a certificate of appealability.

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are

being made. The District Court need not consider frivolous, conclusive, or general objections. Battles v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the district court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the district court. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140, 150-153, 106 S. Ct. 466, 472-74 (1985); Douglass v. United Servs. Auto. Assoc., 79 F.3d 1415 (5th Cir. 1996)(en banc).

To the extent that a party has not been served by the Clerk with this Report and Recommendation electronically, pursuant to the CM/ECF procedures of this District, the Clerk is ORDERED to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED this 30th day of March, 2010.

A handwritten signature in black ink, appearing to read "Robert Pitman", written over a horizontal line.

ROBERT PITMAN
UNITED STATES MAGISTRATE JUDGE