



POWELL v. DRETKE

2004 | Cited 0 times | N.D. Texas | February 26, 2004

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b), and an order of the District Court in implementation thereof, the subject cause has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for a writ of habeas corpus brought by a state prisoner pursuant to 28 U.S.C. § 2254.

Parties: Petitioner is presently incarcerated at the Estelle Unit of the Texas Department of Criminal Justice — Correctional Institutions Division in Huntsville, Texas. Respondent is the Director of TDCJ-CID. The Court has not issued process in this case.

Statement of the Case: Following his plea of not guilty, Petitioner was convicted by a jury of murder in Criminal District Court No. 5 of Dallas County, Texas, cause number F93-20671-NL. Page 2 (Petition at 2). Punishment was assessed at sixty years imprisonment on September 29, 1994. (Id.). His direct appeal was dismissed for want of jurisdiction on May 14, 1996. *Powell v. State*, No. 05-95-00437-CR. (Petitioner's Memorandum in Support of Writ of Habeas Corpus at 1).

In 1998, Petitioner filed a state habeas application pursuant to art. 11.07, Texas Code of Criminal Procedure, seeking an out-of-time appeal due to counsel's failure to file a timely notice of appeal. (Id.). The Texas Court of Criminal Appeals granted Petitioner's request on September 30, 1998. (Id.). Thereafter, Petitioner, through appointed counsel, filed a direct appeal. (Id. at 1-2). On October 25, 1999, the Fifth Court of Appeals affirmed the judgment of conviction. *Powell v. State*, No. 05-98-01726-CR, <http://www.courtstuff.com/FILES/05-98-059801726.HTM> (Docket Sheet information generated on Sept. 18, 2003).

On May 6, 2003, Petitioner filed his second state habeas application, raising the grounds at issue in this case. (Petition at 4 and Memorandum in Support at 2). The Court of Criminal Appeals denied the application on June 18, 2003. (Id.).



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In his federal petition, Petitioner alleges his conviction was obtained by the use of evidence gained from an unconstitutional search and seizure and an unlawful arrest; he was denied the effective assistance of counsel at trial and on direct appeal; and he is actually innocent of the crime of which he was convicted. (Petition ¶ 20).¹

Findings and Conclusions: Petitioner filed his § 2254 petition after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Therefore, the AEDPA governs the present petition. See *Lindh v. Murphy*, 521 U.S. 320 (1997). The AEDPA establishes a one-year statute of limitations for state inmates seeking federal habeas corpus relief. See 28 U.S.C. § 2244(d). The district court may raise the affirmative defense of the statute of limitations sua sponte. See *Kiserv. Johnson*, 163 F.3d 326 (5th Cir. 1999).²

Section 2244(d) provides as follows: (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.

In *Salinas v. Dretke*, the Fifth Circuit recently held that in Texas the procedures for seeking an out-of-time petition for discretionary review (PDR) is part of the state habeas review process, not the direct appeal review process. 354 F.3d 425, 430-431 (5th Cir. 2004). As a result, the granting of an out-of-time PDR "does not require a federal court to restart the running of AEDPA's limitations period altogether." *Id.* at 430. Rather, "when a petitioner convicted in the Texas system acquires the right to file an 'out-of-time' PDR, the relief tolls AEDPA's statute of limitations until the date on which the Court of Criminal Appeals declines to grant further relief." *Id.*

Although the *Salinas* opinion did not address the running of the limitation period in the context of the granting of an out-of-time appeal, the same reasoning applies. In Texas the procedure for seeking an out-of-time appeal, just like the procedure for seeking an out-of-time PDR, is through the state habeas process. See *Salinas*, 354 F.3d at 431 and n. 7 (noting that the appropriate vehicle for seeking an out-of-time appeal from a final felony conviction is by art. 11.07 writ of habeas corpus). Therefore, because Petitioner's right to file an "out-of-time" appeal is necessarily the product of state habeas review, it does not restart the one-year clock. Accordingly, the Court of Criminal Appeals' granting of



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Petitioner's first state habeas application does not alter the fact that the one-year statute of limitations began to run at the latest on August 13, 1996 (ninety days following the May 14, 1996 dismissal of his appeal for want of jurisdiction), and fully lapsed one year later on August 12, 1997.

In response to this court's order to show cause, Petitioner requests this court to toll the limitation period from the affirmance of his direct appeal until the Texas Court of Criminal Appeals denied his second state writ. (Petitioner's Response to Court's Show Cause Order at 8).³ Even if the court were to equitably toll the limitation period for the requested forty-three-month period, there still remain two unexplained intervals totaling approximately seventeen months during which Petitioner is entitled to neither statutory nor equitable tolling. The first time period lasted approximately thirteen months — from August 12, 1997 (the last day of the one-year period), until September 30, 1998 (the date of granting of the out-of-time appeal). The second period lasted an additional four months — from June 18, 2003, (the date of denial of the second writ), until October 25, 2003, (the date of filing of this federal petition).

RECOMMENDATION:

For the foregoing reasons the magistrate judge recommends that the petition for a writ of habeas corpus be dismissed as barred by the one-year limitation period. See 28 U.S.C. § 2244(d).

The Clerk will transmit a copy of this recommendation to Petitioner.

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten days after being served with a copy of this recommendation. Pursuant to *Douglas v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten day period may bar a de novo determination by the district judge of any finding of fact or conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

1. For purposes of this recommendation, the petition is deemed filed on October 25, 2003, the date Petitioner signed it and presumably placed it in the prison mail. See *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998) (holding that a federal petition is deemed filed for determining application of the AEDPA when the prisoner tenders it to prison officials for mailing).

2. On November 6, 2003, the magistrate judge informed Petitioner of the one-year statute of limitations and granted him thirty days to show cause why his petition should not be dismissed as barred by the limitation period. Petitioner filed a response to the show cause order on December 2, 2003.



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3. He explains that being indigent, he had to wait until his family could afford to buy the state court record before proceeding in state court. (Petitioner's Response to Show Cause Order at 4-5). He further asserts that his appellate counsel had a conflict of interest, and that substitute counsel should have filed a new brief on direct appeal. (Id. at 2).

