**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**August 26, 2009**

**Elisabeth A. Shumaker**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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| STEVE HARRIS,<br>Petitioner-Appellant,<br>v.<br>LOWELL CLARK,<br>Respondent-Appellee. | No. 09-4055<br>(Case No. 06-CV-00587-DAK)<br>(D. Utah) |

**ORDER**[*]

Before **HARTZ**, **McKAY**, and **O'BRIEN**, Circuit Judges.

Pro se Petitioner, Steve Harris, a Utah State inmate, seeks a Certificate of Appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 habeas petition. Petitioner was convicted in a Utah State court of aggravated burglary and use of a dangerous weapon in the commission of the offense. On March 25, 2002, the court sentenced him to an indeterminate term of six years to life in prison. Petitioner appealed. On November 14, 2003, the Utah Court of Appeals sustained Petitioner's conviction. *See State v. Harris*, 2003 UT App 384U. Petitioner filed no further direct appeals and sought no state post-

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

conviction relief. He did, however, file a § 2254 petition in the District of Utah on July 18, 2006. The district court dismissed Petitioner's habeas petition as untimely and denied him a COA.

To obtain a COA, Petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this burden, he must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotations omitted).

For numerous reasons, Petitioner has not met this burden. For one thing, the Antiterrorism and Effective Death Penalty Act (AEDPA) establishes a one-year statute of limitations period for § 2254 petitions. 28 U.S.C. § 2244(d)(1). This period generally runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[1] *Id.* In Petitioner's case, the limitations period began to run on January 12, 2004—the day marking the end of the extended period of time in which Petitioner could have filed a petition for a writ of certiorari before the Utah Supreme Court. Normally, direct review of a criminal conviction includes the

[1] Although other provisions dictate the limitations period in particular circumstances, *see* § 2244(d)(1)(B–D), Petitioner has not asserted any of these provisions apply to his case, nor do they appear to apply.

time necessary to file a United States Supreme Court petition for certiorari. *See Locke v. Saffle*, 237 F.3d 1269, 1271–73 (10th Cir. 2001). However, in this case, Petitioner could not have sought United States Supreme Court review because he failed to timely file for certiorari before the Utah Supreme Court. *See* 28 U.S.C. § 1257(a) (limiting United States Supreme Court jurisdiction to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.") Therefore, as of January 12, 2004, when Petitioner could no longer seek direct review, Petitioner's conviction became final for AEDPA time limitation purposes. Consequently, Petitioner had until January 12, 2005, to file his federal habeas petition. However, he first filed it on July 18, 2006—more than eighteen months too late.

Petitioner claims he is entitled to equitable tolling of this limtations period. However, equitable tolling is only available in "rare and exceptional circumstances," and only where the petitioner "diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." *Garcia v. Shanks*, 351 F.3d 468, 473 n.2 (10th Cir. 2003) (internal quotations omitted). In this case, Petitioner has not established that he diligently pursued his claims. In response to Petitioner's initial motion for an extension of time, the Utah Supreme Court granted Petitioner thirty additional days to file a petition for a writ of certiorari. Petitioner claims

he filed a second motion for an extension of time on December 16, 2003. However, the court granted no additional time.[2] Petitioner claims ignorance of this, saying he did not know his time to file for certiorari had expired until after he inquired into the status of the case in June 2006. This illustrates the problem precisely. Petitioner first inquired into the proceedings in June 2006—two and one-half years after he claims to have filed his second extension motion. He took no action on the petition in the meantime. This is not sufficient diligence.

Further, Petitioner argues that he was not aware of the AEDPA's time limitations. However, such ignorance does not toll AEDPA's requirements. *See Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) ("[I]gnorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing."). Petitioner claims his appellate attorney failed to advise him of the requirements for certiorari petitions and the provisions of the AEDPA and that the prison contract attorneys similarly failed to assist him. However, even if the record shored up these claims, the conduct alleged falls far short of the "egregious attorney misconduct" that may justify equitable tolling. *Fleming v. Evans*, 481 F.3d 1249, 1256 (10th Cir. 2007).

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[2] The court would not have been able to grant additional time even if it had wanted to. Rule 48 of the Utah Rules of Appellate Procedure prohibits extensions extending "30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later." Utah R. App. P. 48(e). This rule cannot be suspended. *See* Utah R. App. P. 2.

Finally, Petitioner makes an argument of actual innocence. However, he fails to demonstrate that, in light of "reliable evidence not presented at trial," *Calderon v. Thompson*, 523 U.S. 538, 559 (1998), "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 329 (1995). And a claim of actual innocence does not by itself toll the AEDPA's filing requirements. In short, Petitioner has failed to demonstrate that his inability to file his habeas petition within the one-year period was due to extraordinary circumstances beyond his control or that he is otherwise entitled to equitable tolling. *See Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000).

Even setting aside the time limitations issue, nothing in our careful review of the substance of Petitioner's habeas claims, the record on appeal, or Petitioner's filing reveals any issue which meets our standard for the grant of a COA. In evaluating whether Petitioner has satisfied his burden, we undertake "a preliminary, though not definitive, consideration of the [legal] framework" applicable to each claim. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). Although Petitioner need not demonstrate his appeal will succeed to be entitled to a COA, he must "prove something more than the absence of frivolity or the existence of mere good faith." *Id.* (internal quotations omitted). In this case, the district court's resolution of Petitioner's habeas application is not reasonably subject to debate and Petitioner's claims are not adequate to deserve further

proceedings. Petitioner simply has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and we cannot say "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner," *Slack*, 529 U.S. at 484. Therefore, we DENY Petitioner's request for a COA and DISMISS the appeal. All other pending motions are DENIED.

Entered for the Court

Monroe G. McKay
Circuit Judge