

172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.)))

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
 Tenth Circuit.
 Rodney Alan GUNDERSON, Petitioner-Appellant,
 v.
 Scott ABBOTT, Warden of the Wyoming State Penitentiary, and The Attorney General of the State of Wyoming, Respondents-Appellees.
No. 05-8125.

March 24, 2006.

Background: Following affirmance of state court convictions for aggravated assault and battery, 925 P.2d 1300, defendant filed federal petition for habeas corpus relief. This petition was dismissed for failure to exhaust state court remedies, and that decision was affirmed on appeal, 201 F.3d 447. After exhausting state court remedies, defendant filed a second habeas petition. The United States District Court for the District of Wyoming dismissed second petition as untimely and denied defendant a certificate of appealability (COA). Defendant appealed.

Holdings: The Court of Appeals held that:

- (1) limitations period for federal habeas corpus petition began to run when defendant's conviction became final by virtue of the expiration of the 90-day period to file a petition for writ of certiorari with the United States Supreme Court;
- (2) defendant was not entitled to statutory tolling; and
- (3) defendant was not entitled to equitable tolling.

Appeal dismissed.

West Headnotes

[1] Habeas Corpus 197 603

197 Habeas Corpus
 197III Jurisdiction, Proceedings, and Relief
 197III(A) In General
 197k603 k. Laches or Delay. Most Cited Cases

Limitations period for filing a federal habeas corpus petition began to run when defendant's state court conviction became final by virtue of the expiration of the 90-day period to file a petition for writ of certiorari with the United States Supreme Court. 28 U.S.C.A. §§ 2244(d)(1), 2254.

[2] Habeas Corpus 197 603

197 Habeas Corpus
 197III Jurisdiction, Proceedings, and Relief
 197III(A) In General
 197k603 k. Laches or Delay. Most Cited Cases

State court post-conviction application that was submitted after deadline for filing federal habeas corpus petition did not toll the limitations period for the federal petition. 28 U.S.C.A. §§ 2244(d)(2), 2254.

[3] Habeas Corpus 197 603

197 Habeas Corpus
 197III Jurisdiction, Proceedings, and Relief
 197III(A) In General
 197k603 k. Laches or Delay. Most Cited Cases

Statutory provision allowing the one-year limitations period for filing a federal habeas corpus petition to be tolled for the time during which a properly filed application for state post-conviction relief is pending did not allow tolling based on a federal habeas filing. 28 U.S.C.A. §§ 2244(d)(2), 2254.

[4] Habeas Corpus 197 603

172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.)))

197 Habeas Corpus
 197III Jurisdiction, Proceedings, and Relief
 197III(A) In General
 197k603 k. Laches or Delay. Most Cited
 Cases

Fact that district court failed to rule on state inmate's first habeas corpus petition until after the one-year period for filing such a petition had passed and then dismissed the action instead of abating it while inmate exhausted his state court remedies did not warrant equitable tolling of the limitations period, for purposes of a second habeas petition, especially given the languid manner in which inmate pursued the exhaustion of his state court remedies. 28 U.S.C.A. §§ 2244(d)(1), 2254.

[5] Habeas Corpus 197 ↪ 603

197 Habeas Corpus
 197III Jurisdiction, Proceedings, and Relief
 197III(A) In General
 197k603 k. Laches or Delay. Most Cited
 Cases

State inmate's ignorance of the law did not warrant equitable tolling of the one-year limitations period for filing a federal habeas corpus petition. 28 U.S.C.A. §§ 2244(d)(1), 2254.

[6] Habeas Corpus 197 ↪ 603

197 Habeas Corpus
 197III Jurisdiction, Proceedings, and Relief
 197III(A) In General
 197k603 k. Laches or Delay. Most Cited
 Cases

Attorney error did not warrant equitable tolling of the one-year limitations period for filing a federal habeas corpus petition, especially where inmate did not formally retain counsel and attempted to solicit advice from the public defender's office instead. 28 U.S.C.A. §§ 2244(d)(1), 2254.

***807** Rodney Alan Gunderson, Rawlins, WY, David L. Delicath, Attorney General's Office, Cheyenne, WY, for Respondents-Appellees.

Before TACHA, Chief Judge, HARTZ, and TYMKOVICH, Circuit Judges. ^{FN*}

FN* After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R.App. P. 34(a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

ORDER DENYING CERTIFICATE OF APPEALABILITY^{FN}**

FN** This order is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. The court generally disfavors the citation of orders; nevertheless, an order may be cited under the terms and conditions of 10th Cir. R. 36.3.

TIMOTHY M. TYMKOVICH, Circuit Judge.

****1** Petitioner-Appellant Rodney Alan Gunderson, a state prisoner appearing pro se, seeks to appeal the dismissal of his petition for writ of habeas corpus. Gunderson filed his petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Wyoming. The district court dismissed his petition as untimely and also denied his application for a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1) (requiring a petitioner in state custody to obtain a COA before appealing a district court's final order in a habeas corpus proceeding). Gunderson appeals from that ruling, requesting a COA from this court. Because Gunderson has failed to show that reasonable jurists would find the district court's procedural ruling debatable, we deny a COA and dismiss the appeal.

I. Background

172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.)))

Rodney Alan Gunderson was convicted in a bifurcated jury trial on three counts of aggravated assault and battery and was sentenced to life imprisonment as a habitual criminal. His convictions were entered by the trial court on May 19, 1995, and affirmed by the Wyoming Supreme Court on October 11, 1996. Gunderson filed a petition for rehearing, which the state supreme court denied on October 29, 1996. Gunderson never petitioned the United States Supreme Court for writ of certiorari.

Gunderson did not immediately pursue any form of state post-conviction relief. Instead, he moved directly into a federal forum, filing a habeas petition in the Wyoming district court on October 31, 1997. *808 The district court dismissed the petition without prejudice on May 6, 1999, for failure to exhaust state court remedies. That decision was affirmed by the Tenth Circuit on November 22, 1999, *Gunderson v. Hettgar*, 201 F.3d 447 (10th Cir.1999) (unpublished), and the United States Supreme Court denied certiorari on December 11, 2000, *Gunderson v. Hettgar*, 531 U.S. 1053, 121 S.Ct. 659, 148 L.Ed.2d 562 (2000).

On May 12, 2000, while his federal certiorari petition was pending, Gunderson filed a state law petition for post-conviction relief. That petition was dismissed by the state court on August 28, 2000. Over four years later, on October 22, 2004, Gunderson sought review of the dismissal by filing a petition for writ of certiorari with the Wyoming Supreme Court. This petition was denied on November 10, 2004.

Gunderson then returned to federal court, filing a second habeas petition in the district court on December 21, 2004. This petition was dismissed as untimely on November 29, 2005, and the district court denied Gunderson a COA on December 29, 2005.

II. Discussion

This court may issue a COA if a petitioner “has

made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); see *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Where, as here, the district court denies a habeas petition on procedural grounds, the burden is on the petitioner to demonstrate *both* “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.” *Slack*, 529 U.S. at 484, 120 S.Ct. 1595 (emphasis added). In Gunderson’s case, we need not reach the substantive claims, because he has failed to show that the district court’s procedural ruling was debatable.

**2 [1] The Antiterrorism and Effective Death Penalty Act (AEDPA) provides a one-year statute of limitations for all habeas petitions filed by state prisoners. 28 U.S.C. § 2244(d)(1). In this case, the period began running on January 27, 1997, when Gunderson’s conviction became final by virtue of the expiration of the ninety-day period to file a petition for writ of certiorari with the United States Supreme Court. 28 U.S.C. § 2244(d)(1)(A); *Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir.2001). Thus, since the one-year limitation in AEDPA is calculated using the anniversary date method, *United States v. Hurst*, 322 F.3d 1256, 1259-61 (10th Cir.2003), the deadline for filing a federal habeas petition in this case was January 27, 1998—nearly seven years before Gunderson filed the present petition.

Although his petition was clearly untimely, Gunderson contends his late filing should be excused. Construing his pleadings liberally, *Cummings v. Evans*, 161 F.3d 610, 613 (10th Cir.1998), Gunderson makes a number of arguments, which fall under two main rubrics: (1) statutory tolling, and (2) equitable tolling.^{FN1}

FN1. Gunderson also attempts to argue that, because his second petition is not considered “successive” for purposes of 28

172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.)))

U.S.C. § 2244(b)(2), it should not be given its own filing date for purposes of § 2244(d)(1). The United States Supreme Court previously held, where a petitioner's first federal habeas petition is dismissed for failure to exhaust without ruling on the merits and the petitioner files a second federal habeas petition, it will be "treated as any other first petition" and is not a successive petition for purposes of the exacting review standards set forth in § 2244(b)(2). *Slack*, 529 U.S. at 487, 120 S.Ct. 1595 (internal citations omitted). Gunderson argues that this means his second petition should be given the date of his first petition for purposes of § 2244(d)(1). However, this argument not only lacks support from the case law he cites but it cuts against another holding of the United States Supreme Court. See *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 1533-35, 161 L.Ed.2d 440 (2005) (granting the district court limited discretion to stay proceedings on habeas petitions with unexhausted claims while acknowledging that, if the district court dismisses after the time limit has passed, a second petition will be untimely).

*809 A. Statutory Tolling

[2][3] AEDPA allows the one-year period to be tolled for the "time during which a properly filed application for State post-conviction or other collateral review" is pending. 28 U.S.C. § 2244(d)(2). However, Gunderson cannot avail himself of this remedy because he failed to seek any post-conviction relief in state court until May 12, 2000, which was nearly two and a half years after the AEDPA deadline had passed. A state court filing submitted after the AEDPA deadline does not toll the limitations period. *Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir.2001). Nor can Gunderson use this provision to toll the deadline based on his first federal habeas filing, because the United States Su-

preme Court has explicitly held that Congress's use of the word "State" indicates it did not intend to allow tolling based on federal filings. *Duncan v. Walker*, 533 U.S. 167, 172-73, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

B. Equitable Tolling

Equitable tolling is an extraordinary remedy employed by this court in "rare and exceptional circumstances." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir.2000). We have held it is "only available when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir.2000). "Simple excusable neglect is not sufficient." *Gibson*, 232 F.3d at 808.

[4] Gunderson supplies a number of reasons for his late filing, all of which attempt to shift responsibility to another party. First, he argues, the district judge caused him to miss his deadline by ruling on his initial habeas petition after the one-year period had passed and then dismissing the action instead of abating it while he exhausted his state court remedies. We already ruled in Gunderson's first appeal that these actions by the district court did not constitute an abuse of discretion. *Gunderson*, 201 F.3d 447. Moreover, the United States Supreme Court recently emphasized that, although district court delays may keep a petitioner from ever being heard on unexhausted habeas claims, the purposes of AEDPA require adherence to the principle that "stay and abeyance should be available only in limited circumstances" where there was "good cause for the petitioner's failure to exhaust his claims first in state court." *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 1535, 161 L.Ed.2d 440 (2005).

**3 In this case, Gunderson's sole excuse for his initial failure to exhaust is that he was unaware of the requirement. Where even discretionary stay or abeyance has been so narrowly circumscribed by the Supreme Court, we certainly cannot *compel*

172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.)))

such relief based on mere ignorance of the law, which neither removes fault from the petitioner nor sets him apart from any other case. The argument is particularly weak in this case, because the exhaustion requirement is listed as a prerequisite in the federal habeas statute that Gunderson employed to seek relief. 28 U.S.C. § 2254(c). Moreover, even if the district court had *810 chosen to abate the federal proceedings, Gunderson has not explained why he delayed for over four years between stages of state court review. *See Rhines*, 125 S.Ct. at 1535 (holding a petitioner who unnecessarily delays state court proceedings should not receive a stay of federal habeas proceedings). Thus, Gunderson's failure to follow the express federal habeas requirements in the first instance, coupled with the languid manner in which he pursued exhaustion of his state court remedies, demonstrate that he did not "diligently pursue[] his claims." and is therefore not entitled to this extraordinary equitable remedy.

[5] Gunderson's second and third arguments both seek to justify his ignorance of the law. He contends, "This Petitioner is [u]ntrained and [u]nskilled in the [l]aw and therefore should not be held to the exacting standards a [q]ualified [l]awyer is required to." Aplt. Br. at 3. However, failure to learn applicable law does not constitute "extraordinary circumstances beyond his control." Indeed, "it is well established that ignorance of the law, even for an incarcerated pro se prisoner, generally does not excuse prompt filing." *Marsh*, 223 F.3d at 1220; *see Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.1998) (equitable tolling not justified by the fact that petitioner simply did not know about AEDPA time limitation).

[6] Alternatively (and inconsistently), Gunderson asserts that he *did* benefit from the assistance of counsel but that he was incorrectly advised with regard to his exhaustion requirements and filing deadlines. However, attorney error is generally not a basis for equitable tolling of the federal habeas deadline. *See, e.g., Merritt v. Blaine*, 326 F.3d 157, 169 (3d Cir.2003) (applying general rule that

"attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the extraordinary circumstances required for equitable tolling") (internal citations omitted); *Rouse v. Lee*, 339 F.3d 238, 248 (4th Cir.2003) ("a mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party's control where equity should step in to give the party the benefit of his erroneous understanding") (internal citations omitted); *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir.2005) ("Ineffective assistance of counsel, where it is due to an attorney's negligence or mistake, has not generally been considered an extraordinary circumstance [for equitable tolling purposes]").

**4 In this case, where it appears Gunderson never formally retained counsel but somehow attempted to solicit advice from the public defender's office, we find the "ineffective assistance" argument even less compelling. We conclude that Gunderson has failed to show "extraordinary circumstances beyond his control" prevented him from timely filing and is therefore not entitled to relief from this court.

III. Conclusion

Gunderson's petition was untimely filed, and he has failed to demonstrate that he meets the requirements of statutory tolling or that his case presents the kind of rare and exceptional circumstance that would entitle him to equitable tolling. We conclude that jurists of reason would not find the district court's procedural decision debatable. Accordingly, we DENY a COA and DISMISS the case. We GRANT Gunderson's motion to proceed in forma pauperis.

C.A.10 (Wyo.),2006.
 Gunderson v. Abbott
 172 Fed.Appx. 806, 2006 WL 752038 (C.A.10 (Wyo.))

END OF DOCUMENT

Not Reported in F.Supp.2d, 2008 WL 185794 (D.Kan.)
(Cite as: 2008 WL 185794 (D.Kan.))

Only the Westlaw citation is currently available.

United States District Court,
D. Kansas.
Gregory Lynn GALES, Petitioner,
v.
Paul MORRISON, et al., Respondents.
No. 07-3282-SAC.

Jan. 18, 2008.

Gregory Lynn Gales, Hutchinson, KS, pro se.

ORDER

SAM A. CROW, Senior District Judge.

*1 Petitioner proceeds pro se on a petition for writ of habeas corpus under 28 U.S.C. § 2254. Having reviewed the record, the court finds this action is subject to being summarily dismissed as time barred.

As amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996, a one year limitation period applies to habeas corpus petitions filed by prisoners confined pursuant to a state court judgment. 28 U.S.C. § 2244(d)(1). The running of that one year limitation period is subject to tolling if petitioner pursues state post-conviction relief or other collateral review. See 28 U.S.C. § 2244(d)(2)(running of limitations period is tolled while properly filed state post-conviction proceeding and appeal therefrom is pending).

Applying these statutes to the dates provided by petitioner in his application, the court finds this matter is subject to being dismissed because the application is time barred. See *Jackson v. Sec. for Dept. of Corrections*, 292 F.3d 1347 (11th Cir.2002)(joining other circuits in holding that district court has discretion to review sua sponte the timeliness of a 2254 petition even though the statute of limitations

is an affirmative defense).

Petitioner's conviction for second degree murder and arson became final on June 1, 2004 for the purpose of starting the one year limitation period in 28 U.S.C. § 2244(d)(1). Approximately three months later petitioner filed a habeas corpus petition under 28 U.S.C. § 2254 in the District of Kansas. See *Gales v. Bruce*, D.Kan. Case No. 04-3300-SAC. This court denied that petition without prejudice on September 30, 2004, finding petitioner asserted claims that were not included in his state direct appeal, and finding petitioner had not yet sought post-conviction relief to exhaust state court remedies on his claims. The court further cautioned petitioner of the one year limitation period imposed by 28 U.S.C. § 2244(d), and advised petitioner that his federal habeas petition had no tolling effect on the running of that statutory limitation period.

At that time, petitioner had until June 1, 2005, to toll the running of the limitation period by filing a post-conviction action in the state courts. Instead, petitioner filed an appeal from the dismissal of his federal habeas petition. Significantly, the limitation period in 28 U.S.C. § 2254 expired prior to the dismissal of his federal appeal when the Tenth Circuit Court of Appeals denied a certificate of appealability on June 23, 2005.

Thereafter, petitioner filed a complaint under 42 U.S.C. § 1983 in federal court, seeking damages and his release from confinement. See *Gales v. Meeks*, D.Kan. Case No. 05-3321-SAC (dismissed without prejudice August 11, 2005) (appeal dismissed April 3, 2006).^{FN1}

FN1. Petitioner filed a second complaint under 42 U.S.C. § 1983 on November 29, 2006, which this court dismissed without prejudice. See *Gales v. Gatterman*, D.Kan. Case No. 06-3330-SAC (dismissed without prejudice January 12, 2007)(10th Cir. affirmed, June 11, 2007).

Not Reported in F.Supp.2d, 2008 WL 185794 (D.Kan.)
(Cite as: 2008 WL 185794 (D.Kan.))

Petitioner did not file a post-conviction motion under K.S.A. 60-1507 in the state courts until January 13, 2006. The state district court denied relief on July 5, 2006. On August 8, 2007, the Kansas Court of Appeals affirmed that decision, and the Kansas Supreme Court denied further review on November 6, 2007.

* Petitioner's instant action, filed approximately eight days later, is clearly time barred. The one year limitation period for seeking relief in federal court, or for stopping the running of federal limitation period by pursuing post-conviction relief in the state courts, expired more than two years earlier in June 2005. Neither petitioner's filings in federal court, nor his post-conviction motion filed in January 2006, had any tolling effect under 28 U.S.C. § 2244(d)(2) on the one year federal limitation period. See *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001)(AEDPA provision for tolling limitation period during pendency of a properly filed application for State post-conviction or other collateral review does not toll the limitation period during the pendency of a federal habeas petition or appeals therefrom); *Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir.2001)(application for state post-conviction relief filed after expiration of one-year limitations period has no tolling effect), *cert. denied*, 535 U.S. 1034 (2002).

Because the court finds nothing in the record to suggest any basis for equitable tolling of the one year limitation period under 28 U.S.C. § 2241, petitioner is directed to show cause why the petition should not be dismissed as time barred. Petitioner's motions for his immediate release are denied.

IT IS THEREFORE ORDERED that petitioner is granted twenty (20) days to show cause why his petition for writ of habeas corpus should not be dismissed as time barred.

IT IS FURTHER ORDERED that petitioner's motions for immediate or expedited release (Docs. 2 and 4) are denied.

IT IS SO ORDERED.

D.Kan.,2008.

Gales v. Morrison

Not Reported in F.Supp.2d, 2008 WL 185794
(D.Kan.)

END OF DOCUMENT

122 Fed.Appx. 408, 2005 WL 226249 (C.A.10 (Okla.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 122 Fed.Appx. 408, 2005 WL 226249 (C.A.10 (Okla.)))

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
 Tenth Circuit.
 Victor RIVERA, Jr., Petitioner-Appellant,
 v.
 Steven BECK, Warden, Respondent-Appellee.
 No. 04-6317.

Feb. 1, 2005.

Background: Defendant convicted on a plea of guilty to a charge of first degree murder petitioned for a writ of habeas corpus. The United States District Court for the Western District of Oklahoma denied relief. Defendant appealed and sought a certificate of appealability (COA).

Holdings: The Court of Appeals held that:

- (1) petitioner was not entitled to equitable tolling of the limitations period, and
- (2) there was nothing improper in a magistrate judge raising the issue of a limitations bar sua sponte.

Request for COA denied, and appeal dismissed.

West Headnotes

[1] Habeas Corpus 197 ↪603

197 Habeas Corpus
 197III Jurisdiction, Proceedings, and Relief
 197III(A) In General
 197k603 k. Laches or Delay. Most Cited Cases
 Habeas petitioner was not entitled to equitable

tolling of the limitations period, absent evidence to support his claims that the trial court failed to advise him of his right to appeal or that he did not enter his guilty plea knowingly and intelligently due to mental deficiency. 28 U.S.C.A. § 2244(d).

[2] United States Magistrates 394 ↪21

394 United States Magistrates
 394k18 Particular Types of Cases
 394k21 k. Criminal Cases, Prisoners' Actions, and Habeas Corpus. Most Cited Cases
 There was nothing improper in a magistrate judge raising the issue of a limitations bar sua sponte in a habeas proceeding. 28 U.S.C.A. § 2254.
 *408 Victor Rivera, Jr., Stringtown, OK, pro se.

Before EBEL, MURPHY, and McCONNELL, Circuit Judges.

ORDER^{FN*}

FN* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.

**1 Victor Rivera Jr., a state prisoner proceeding *pro se*, seeks a certificate of appealability (COA) that would allow him to appeal from the district court's order denying his habeas corpus petition under 28 U.S.C. § 2254. See 28 U.S.C. § 2253(c)(1)(A). Because we conclude that Mr. Rivera has failed to make "a substantial showing of the denial of a constitutional right," we deny his request for a COA, and we dismiss the appeal. 28 U.S.C. § 2253(c)(2).

***409 I. Background**

On September 5, 2000, Mr. Rivera pled guilty in Oklahoma state court to a charge of first degree

122 Fed.Appx. 408, 2005 WL 226249 (C.A.10 (Okla.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 122 Fed.Appx. 408, 2005 WL 226249 (C.A.10 (Okla.)))

murder. The court sentenced Mr. Rivera to life imprisonment on December 5, 2000. Mr. Rivera did not file any post-conviction action in the state district court until August 25, 2003, and filed his federal habeas petition on July 1, 2004.

The district court referred the matter to a magistrate judge consistent with the provisions of 28 U.S.C. § 636(b)(1)(B), who determined that Mr. Rivera filed the petition outside of the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2244(d). The magistrate judge found that Mr. Rivera's one-year period to file a habeas petition began to run on December 15, 2000, the day his conviction became final, and expired on December 15, 2001. *See* 28 U.S.C. § 2244(d)(1)(A). The magistrate judge also determined that no tolling of the limitation period was warranted.

After considering Mr. Rivera's objections and conducting a de novo review, the district court adopted the magistrate judge's Report and Recommendation in its entirety and dismissed Mr. Rivera's habeas petition as untimely. Mr. Rivera then applied to this Court for a COA.

II. Analysis

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires a prisoner whose habeas petition was denied solely on procedural grounds to show "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." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). "[B]oth showings [must] be made before the court of appeals may entertain the appeal." *Id.* at 485, 120 S.Ct. 1595. If a procedural bar is "plain" and "the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude

either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* at 484, 120 S.Ct. 1595.

[1] Mr. Rivera argues that the district court erred in failing to equitably toll the period of limitation. Equitable tolling of AEDPA's limitation period is limited to "rare and exceptional circumstances" such as "when an adversary's conduct ... prevents a prisoner from timely filing...." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir.2000). The burden is on the petitioner to demonstrate the circumstances that justify equitable tolling. *Miller v. Marr*, 141 F.3d 976, 977 (10th Cir.1998).

**2 Mr. Rivera first claims that the statute of limitations should be tolled because the trial court failed to advise him of his right to appeal. The magistrate judge, however, noted in his Report and Recommendation that the Oklahoma Court of Criminal Appeals "found that the petitioner had been properly advised of his right to appeal." Report and Recommendation at 13. Support for this statement is found in the transcript of Mr. Rivera's sentencing hearing. Petitioner's Br. Ex. A.2 at 4. Mr. Rivera has introduced no new evidence in his appeal to contradict the findings of the district court. Absent clear and convincing evidence otherwise, a state court's factual findings are presumed correct. 28 U.S.C. § 2254(e)(1). Thus, we reject this claim.

Second, Mr. Rivera claims that the statute of limitations should be tolled because *410 he did not enter his guilty plea knowingly and intelligently due to mental deficiency. This claim is likewise without merit. "The Tenth Circuit has never held that mental incapacity tolls the statute of limitation." *Biestler v. Midwest Health Serv., Inc.*, 77 F.3d 1264, 1268 (10th Cir.1996). "The few courts which have recognized an exception for mental incapacity have limited the application of this equitable doctrine to exceptional circumstances." *Id.*

Not only is Mr. Rivera's claim for equitable tolling based on mental incapacity without legal support in this circuit, it also lacks factual support. In March

122 Fed.Appx. 408, 2005 WL 226249 (C.A.10 (Okla.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 122 Fed.Appx. 408, 2005 WL 226249 (C.A.10 (Okla.)))

2000, Mr. Rivera's competency was evaluated by a psychologist at Eastern State Hospital in Oklahoma who concluded that Mr. Rivera met "the common criteria associated with legal competency." Petitioner's Br. Ex. A.4. at 3. At the time of sentencing, the trial court diligently reviewed Mr. Rivera's mental health history and determined that Mr. Rivera was legally competent to enter his plea. Petitioner's Br. Ex. A.2.at 3-5, 9-10, 14. Again, Mr. Rivera has failed to introduce any evidence to overcome the presumption that a state court's factual findings are correct. 28 U.S.C. § 2254(e)(1). Rather, he has only restated his belief that he lacked capacity. Therefore, this claim must fail.

(Okla.)

END OF DOCUMENT

[2] Finally, Mr. Rivera argues that the magistrate judge improperly raised the issue of limitations sua sponte. There was nothing improper in this. "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition...." Rules Governing § 2254 Cases, Rule 4, 28 U.S.C. foll. § 2254. This Court has found that it is proper to raise the issue of procedural default sua sponte. See *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir.1992); *U.S. v. Allen*, 16 F.3d 377, 378-79 (10th Cir.1994).

We therefore find no basis for granting a certificate of appealability. Reasonable jurists would agree that the district court correctly applied § 2244(d)(1)(A) when calculating the date Mr. Rivera's one-year period began to run and correctly determined that there was no basis for equitable tolling. Because the district court properly invoked this plain procedural defect to dismiss Mr. Rivera's petition, we need not reach his constitutional claims. See *Slack*, 529 U.S. at 484-85, 120 S.Ct. 1595.

****3** Accordingly, we **DENY** Mr. Rivera's request for a COA and **DISMISS** this appeal.

C.A.10 (Okla.),2005.
Rivera v. Beck
122 Fed.Appx. 408, 2005 WL 226249 (C.A.10