

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JOSHUA STUMP,)
)
 Petitioner,)
)
 vs.) CASE NO. CIV-05-397-R
)
 STATE OF OKLAHOMA, et al.,)
)
 Respondent.)

**PETITIONER'S OBJECTION TO
MAGISTRATE'S REPORT AND RECOMMENDATION**

COMES NOW the Petitioner, Joshua Stump, by and through his attorney of record, M. Michael Arnett of the Arnett Law Firm, and objects to the Report and Recommendation of the Magistrate Judge filed on the 9th day of June, 2005. In support thereof, Petitioner submits the following:

According to 28 U.S.C. §2254(d)(2), the federal court can grant habeas relief if the state court has made "an unreasonable determination of the facts in light of the evidence presented." In the instant cause of action, the trial court accepted a plea and sentenced Petitioner to seventy-five years. The only reasons this plea was entered by Petitioner was the assurances of his counsel that he would serve seven to nine years and then be released, and that this was the only option available to Petitioner. In his Application for Post Conviction Relief, Petitioner presented the Court with this and other instances of ineffective assistance of counsel which prejudiced Petitioner. To further exacerbate the situation, Petitioner's trial counsel was contacted about the situation prior to the filing of the Application for Post Conviction Relief and trial counsel reiterated to Petitioner and his family that it was still his belief that Petitioner should be released as he

previously outlined. At no time in the history of the State of Oklahoma has it been the practice of the Oklahoma Department of Corrections to require as little as ten percent (10%) of a sentence on Second Degree Murder. Yet Petitioner was led to believe that that is all that would be required of him.

The Standard of ineffective assistance at trial is clearly established: (1) counsel's performance was constitutionally deficient and (2) counsel's deficient performance was prejudicial. In this matter, defense counsel's failure to properly advise Petitioner on the length of sentence and provide a realistic explanation of the sentence and the way it would be carried out by the Department of Corrections clearly meets the standard of ineffective assistance of counsel.

It was not until Petitioner learned that he could not, and would not, be released by the Department of Corrections as anticipated, that he realized that further action needed to be taken to secure his release. Therefore, with the original plea being taken in 1996, it was not until late 2003/early 2004 that Petitioner ascertained the level of ineffective assistance of counsel he had suffered and proceeded with his Application for Post Conviction Relief. As set out in Petitioner's Motion to Show Cause Why Writ Should Not Be Dismissed As Untimely, Petitioner sets out the dates of each stage of that action and shows the Court that the Petition for Writ was filed within one year of the State Appellate Court's denial of Petitioner's Application for Post Conviction Relief. This is but one of the instances wherein defense counsel failed in his duty to zealously protect the interests of his client.

Holding Petitioner to the one year statute of limitations for filing a Writ from the date of the original plea is inherently unfair and prejudicial because it was not until

several years later that he was aware of the ineffective assistance of counsel or that action needed to be taken. Petitioner exhausted his state court remedies with the filing of the Application for Post Conviction Relief in District Court and follow-up with the appellate court. At this time, it was determined that no further relief was available to Petitioner in the state court system and that he needed to present his case to the federal courts for relief.

WHEREFORE, premises considered, Petitioner prays this Honorable Court recognize his objection to the Magistrate Judge's Report and Recommendation, hear Petitioner's Writ of Habeas Corpus in its entirety, grant Petitioner the relief requested, and for such other and further relief as this Court deems just and equitable.

Respectfully Submitted,

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Attorneys for Petitioner

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v.)	CIV-05-397-R
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Respondents.)	

ORDER

Before the Court are the Report and Recommendation of United States Magistrate Judge Bana Roberts entered June 9, 2005 and Petitioner's Objection to the Report and Recommendation filed June 29, 2005. Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court reviews *de novo* those aspects of the Report and Recommendation to which Petitioner objects.

The Magistrate Judge recommended that the petition be dismissed upon filing as untimely. She found that Petitioner's conviction upon his guilty plea became final on May 6, 1996, which was the last day on which Petitioner could have moved to withdraw his guilty plea pursuant to Rule 4.2(A), Rules of the Oklahoma Court of Criminal Appeals. Because Petitioner's conviction became final after the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) took effect on April 24, 1996, the Magistrate Judge correctly found that Petitioner had one year from the date his conviction became final or until May 6, 1997 to file his federal habeas petition and because he did not do so, his petition is barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1)(A), absent statutory or equitable

tolling. She further concluded that neither statutory tolling pursuant to 28 U.S.C. § 2244(d)(2) nor equitable tolling applied. Statutory tolling was inapplicable because Petitioner did not file his state court application for post-conviction relief until after the one-year limitation period under § 2244(d)(1)(A) had already expired. Report and Recommendation at p. 5, citing *Barnes v. Booker*, 229 F.3d 1162, 2000 WL 1346234 at *1 (10th Cir. Sept. 19, 2000) (No. OO-7066). Equitable tolling was not available, the Magistrate Judge concluded, because none of the exceptional circumstances warranting it had been shown, nor had Petitioner shown that he had diligently pursued his federal claims. *Id.* at pp. 6-7.

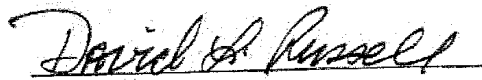
In his Objection, Petitioner asserts that “[i]t was not until Petitioner learned that he could not, and would not, be released by the Department of Corrections as anticipated,” that is, after serving seven to nine years of a 75-year sentence, “that he realized that further action needed to be taken to secure his release.” Objection at p. 2. He suggests that is was then that he “ascertained the level of ineffective assistance of counsel he had suffered and proceeded with his Application for Post Conviction Relief.” *Id.* Petitioner then suggests that because his petition was filed within one year after the Oklahoma Court of Criminal Appeals’ affirmed the denial of his application for post-conviction relief, his petition should be treated as timely.

By his Objection, petitioner seemingly attempts to invoke either 28 U.S.C. § 2244(d)(1)(D) or equitable tolling predicated on an uncontrollable circumstance that prevented him from timely filing. However, Petitioner has failed to allege any facts or

present any evidence showing that he could not have discovered, through the exercise of due diligence, that he would not be released within seven to nine years, as his attorney had allegedly advised him, until late 2003 or early 2004. Accordingly, Petitioner has not shown that Section 2244(d)(1)(D) applies. For essentially the same reasons – because Petitioner has not shown that uncontrollable circumstances prevented him from timely filing and his diligence in pursuing his federal claims, equitable tolling is not warranted. *See generally Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000).

In accordance with the foregoing, the Report and Recommendation of United States Magistrate Judge Bana Roberts is ADOPTED in its entirety and the petition of Joshua Stump for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED upon filing as time-barred pursuant to 28 U.S.C. § 2244(d)(1)(A).

IT IS SO ORDERED this 1st day of July, 2005.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

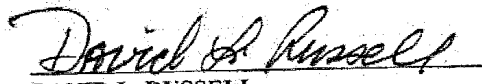
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JUDGMENT

In accordance with the Order entered this 1st day of July, 2005, it is ORDERED, ADJUDGED and DECREED that the petition of Joshua Stump for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED.

IT IS SO ORDERED this 1st day of July, 2005.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE