UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JOSHUA STUMP, Petitioner-Appellant, v. STATE OF OKLAHOMA, and ERIC FRANKLIN, WARDEN, OKLAHOMA STATE REFORMATORY, Respondents-Appellees.	No. 05-6325 (W.D. of Okla.) (D.C. No. CV-05-397-R)

ORDER GRANTING CERTIFICATE OF APPEALABILITY

Before **TYMKOVICH**, Circuit Judge.

Petitioner-Appellant Joshua Stump, a state prisoner appearing through counsel, requests a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition as untimely. We grant Stump a COA on the following issue:

> Whether a petitioner, alleging that he received mistaken advice from his counsel regarding parole eligibility, exercises due diligence under § 2244(d)(1)(D) if he does not file a habeas petition until the asserted parole release date.

I. Background

Stump pleaded guilty in Oklahoma state court to second degree murder in April 1996 and was sentenced to 75 years of imprisonment. Prior to his plea, Stump's counsel allegedly assured him that he would be paroled in seven to nine years. He did not file a direct appeal. In February 2004, he filed a petition for state post-conviction relief, which was denied. He then filed the instant federal habeas petition asserting his trial counsel was ineffective in that his plea was induced by his counsel's mistaken assurances regarding his parole eligibility.

The district court sua sponte[1] dismissed Stump's petition as untimely pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), finding that he failed to file his petition within one year from "the date

---

[1] We note that in *Eberhart v. United States*, 126 S. Ct. 403, 407 (2005), the Supreme Court held that non-jurisdictional claim-processing rules are forfeited if not raised by the respondent. AEDPA's one-year tolling provision is such a non-jurisdictional rule. *Day v. McDonough*, 126 S. Ct. 1675, 1681 (2006); *Garcia v. Shanks*, 351 F.3d 468, 473 n.2 (10th Cir. 2003). However, pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, a district court must "promptly examine" a state prisoner's habeas petition and dismiss it "if it plainly appears . . . that the petitioner is not entitled to relief." If the petition is not dismissed, the court must order the government to file a response.

Here, the district court dismissed Stump's petition without allowing the government an opportunity to respond. Because the government had no such opportunity, *Eberhart* does nothing to eliminate the government's right to raise a statute of limitations defense. *Cf. Day*, 126 S. Ct. at 1684 (holding that "district courts are permitted, but not obliged, to consider *sua sponte*" a statute of limitations defense under AEDPA once the respondent has answered a petition without raising such defense, so long as the court accords the parties "fair notice and an opportunity to present their positions").

on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"—here, May 1997. 28 U.S.C. § 2244(d)(1)(A); *see* Rule 4.2(A), Rules of the Oklahoma Court of Criminal Appeals (requiring appeal from a guilty plea within ten days from the date of sentencing). The court further found that his application for state post-conviction relief did not toll that date because his state petition was not filed within AEDPA's one-year limitations period. The court finally rejected Stump's assertion that the one-year limitations period should not have begun until 2004, when it became apparent that he would not be released in the time frame promised by his counsel. Construing this allegation as either a request for application of § 2244(d)(1)(D) or equitable tolling, the court found that Stump did not present any evidence showing either that (1) he could not have discovered, through due diligence, that he would not be released in the advised time frame or (2) uncontrollable circumstances otherwise prevented him from timely filing.

II. Analysis

Where the district court denies a habeas petition on procedural grounds, this court may issue a COA only where a habeas petitioner makes a substantial showing of a denial of a constitutional right, i.e., a demonstration 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 (2000). As the Supreme Court has emphasized, "a COA does not require a showing that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

AEDPA provides that 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," running 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;
> . . .
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Here, Stump asserts that his petition was timely filed under § 2244(d)(1)(D) because he could not have discovered the factual predicate of the claim, namely his counsel's misadvice concerning parole eligibility, until seven years had elapsed and he had not yet been paroled. The district court rejected this claim, finding that Stump did not present any evidence to show he exercised due diligence. However, the burden to make such a showing does not fall on Stump but instead on the party asserting that the limitations period has expired—here, the government—unless it plainly appears that the petitioner's petition is time-barred. *See Dicenzi v. Rose*, 419 F.3d 493, 499 (6th Cir. 2005); Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (stating that a district court must "promptly examine" a state prisoner's

habeas petition and dismiss it "if it plainly appears . . . that the petitioner is not entitled to relief"); *cf. Hooks v. Ward*, 184 F.3d 1206, 1216–17 (10th Cir. 1999) (holding that the government bears the burden of proving the adequacy of a state procedural bar to federal habeas review). Therefore, we are confronted with the question whether a petitioner, alleging that he received mistaken advice from his counsel regarding parole eligibility, exercises due diligence under § 2244(d)(1)(D) if he does not file a habeas petition until the asserted parole release date. This inquiry is necessarily fact-driven and we note that interpretation of due diligence should not "ignore[] the reality of the prison system." *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000).

Accordingly, we grant COA and order counsel for petitioner to file a supplemental opening brief on the issue described above. Petitioner's supplemental brief is due within 30 days of the date of this order. Within 30 days after service of petitioner's brief, respondents shall file an answer brief. Petitioner may file a reply brief within fourteen days of service of respondents' brief if he so desires. All briefs shall be filed and served in compliance with Fed. R. App. P. 28 and 31. Requests for extension of these time limits will be viewed with disfavor.

III. Conclusion

For the foregoing reasons, we grant COA and order briefing by the petitioner and respondents.

Entered for the Court
ELISABETH SHUMAKER

By: 
Deputy Clerk