

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

ARRON MICHAEL LEWIS
Reg. #16557-045

PETITIONER

v.

4:23-cv-01013-LPR-JJV

DEXTER PAYNE, Director,
Arkansas Division of Correction

RESPONDENT

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge Lee P. Rudofsky. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. Your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of this recommendation. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

DISPOSITION

I. BACKGROUND

Petitioner Arron Michael Lewis brings this 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus *pro se*. (Doc. No. 1.) Mr. Lewis was convicted by a jury in the Circuit Court of Pulaski County, Arkansas, of capital murder and kidnapping and was sentenced to consecutive terms of life imprisonment without parole and life, respectively. (Doc. No. 26-3 at 125-27.) On direct appeal, the Arkansas Supreme Court summarized the facts of the case as follows:

On September 25, 2014, Carl Carter reported that his wife, Beverly (“Carter”), a real estate agent, was missing. He stated that Carter had planned to show a house in Scott, but when she had not returned home by 9:00 that evening, he became worried and drove to the Scott residence. There, he saw Carter’s vehicle in the driveway and discovered that she had left her purse inside the car. Officers from the Pulaski County Sheriff’s Department were dispatched to the Scott residence, but they did not find Carter.

Crystal Lowery, Lewis’s wife, testified that she and Lewis had devised a scheme whereby they planned to target a victim who was married, who worked alone, and who allegedly had \$100,000 from whom they would seek a ransom. Lewis and Lowery found Carter’s Facebook page online, discovered that she was a real estate agent, and believed that she was a “rich broker.” They called Carter, identified themselves as Crystal and Steve Adams, and asked Carter to show them a home in a remote location. Posing as Steve Adams, Lewis met Carter at the Scott residence while Lowery went to work. Lowery testified that Lewis later texted her a picture of Carter, who was bound with green tape in the trunk of Lewis’s car. Lowery stated that Lewis planned to take Carter to his place of employment, a concrete plant in Cabot, but that “he didn’t feel secure in leaving her there.” When Lowery came home, she learned that Lewis had locked Carter in the bedroom. Lewis explained that he had Carter’s debit-card PIN but that her purse was still at the Scott location. Lewis asked Lowery to “keep an eye on [Carter]” while he retrieved her purse. When he returned, Lewis told Lowery that “the cops were already there at the house” and that the plan had changed. According to Lowery, Lewis left with Carter, killed her, and left her body near the cement plant. The next morning, Lewis and Lowery purchased a shovel and buried Carter’s body in a shallow grave at the cement-plant site. Dr. Charles Kokes of the Arkansas State Crime Lab testified that Carter’s cause of death was asphyxia due to an external-airway obstruction from a duct-tape mask on her face.

Carter’s phone records indicated that she had placed a call to an unidentified cell-phone number that was returned to TextMe, Inc., a company that assigns phone numbers and provides smartphone users with free text and voice messaging. Pursuant to an exigent-circumstances request, TextMe provided a report to the Pulaski County Sheriff’s Office stating that the unidentified number on Carter’s phone belonged to Lowery, who lived in Jacksonville.

On September 28, 2014, Lieutenant Mark Swaggerty conducted surveillance on Lowery’s home, where he observed Lewis get into a black Ford Fusion and drive away. Both Lewis and the vehicle matched a description of a person and a car seen at the Scott residence when Carter was present. Lieutenant Swaggerty followed Lewis for approximately three miles. As Lewis drove around a curve, he lost control of the vehicle and crashed into a ditch. Lewis’s car landed on the passenger side in a concrete culvert. The lieutenant approached Lewis, who told the officer that he needed to go to the hospital. Emergency personnel arrived and examined Lewis. When Lewis was inside the ambulance, Lieutenant

Swaggerty asked for his telephone number. Lewis responded with a number that was one digit off from the number that was connected to the text messages received by the victim via the TextMe app. When the lieutenant asked Lewis a second time, he gave the correct number. The lieutenant then seized Lewis's phone. According to Swaggerty, Lewis had not been taken into custody at that time. EMTs transported Lewis to the hospital, but he left the hospital during testing that day without notifying any medical staff. Police subsequently apprehended Lewis on September 29, 2014.

Officers returned to the scene of the accident, overturned the vehicle, performed an inventory search of the interior passenger area, and completed a vehicle-search report. Sergeant Shane Hastings signed the report, which indicated that the trunk had not been "opened or inventoried." The investigators surrendered the vehicle to a tow service, which transported the vehicle to the Pulaski County Sheriff's Office where it was locked and secured. Officers obtained a search warrant and found numerous items, including hair fiber, in the trunk of Lewis's car.

Police officers arrested Lewis, who gave two custodial statements.

Lewis v. State, 2017 Ark. 211, 2-4, 521 S.W.3d 466, 469-70.

Among his arguments on appeal, Mr. Lewis contended the trial court erred in denying his motion to suppress evidence obtained through prosecutorial subpoenas to AT&T and Google, which linked the unidentified number on the victim's phone to Lowery. *Id.* at 11-13, 521 S.W.3d at 475-76. The Arkansas Supreme Court affirmed the trial court's ruling that Mr. Lewis lacked standing to challenge the subpoenas, as they were issued to third parties. *Id.* at 13, 521 S.W.3d at 476. The Arkansas Supreme Court rejected Mr. Lewis's remaining arguments on appeal, and its mandate issued on September 14, 2017. (Doc. No. 26-20.) Mr. Lewis did not seek a writ of certiorari in the United States Supreme Court, nor did he pursue any form of post-conviction relief in state court.

In his Petition for Writ of Habeas Corpus now before this Court, Mr. Lewis argues his Fourth Amendment rights were violated by law enforcement's use of prosecutorial subpoenas to collect information from AT&T and Google. (Doc. No. 1 at 7-11.) Mr. Lewis, who is in the custody of the Bureau of Prisons pursuant to a contract with the State of Arkansas under 18 U.S.C.

§ 5003, filed the Petition in the United States District Court for the Central District of California and named as Respondent the Warden of the Victorville Federal Correctional Complex, where he was incarcerated at the time.¹ The Petition was subsequently transferred here, and Dexter Payne, Director of the Arkansas Division of Correction, was substituted as Respondent. (Doc. No. 19.) Respondent Payne contends Mr. Lewis's Petition is barred by the statute of limitations and that his Fourth Amendment claim is unreviewable in habeas. (Doc. No. 26.) After careful consideration, I recommend relief be denied. The Petition should be dismissed with prejudice.

II. ANALYSIS

Mr. Lewis's Petition is untimely based upon the one-year period of limitation imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Title 28 U.S.C. § 2244(d)(1) and (2) impose a one-year period of limitation on habeas corpus petitions:

(d)(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

¹ Mr. Lewis has since been transferred to the United States Penitentiary at Atwater. (Doc. No. 12.)

shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

In this case, the one-year limitation period began to run on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). Mr. Lewis’s convictions were affirmed on June 8, 2017, and the mandate issued on September 14, 2017, when the Arkansas Supreme Court denied Mr. Lewis’s petition for rehearing. (Doc. Nos. 26-16, 26-19, 26-20.) The convictions became final ninety days later, on December 13, 2017, when Mr. Lewis’s time for seeking a writ of certiorari expired. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (for petitioners who do not pursue direct review all the way to the United States Supreme Court, the judgment becomes final when the time for doing so expires); Sup. Ct. R. 13 (a petition for writ of certiorari must be filed within ninety days after entry of judgment, running from the date of the denial of rehearing, if a petition for rehearing was timely filed). Accordingly, the one-year limitation period expired on December 13, 2018. Mr. Lewis’s Petition, filed August 15, 2022, was filed over three years too late.

According to Mr. Lewis, before he was transferred to BOP custody, he was held in solitary confinement in the Arkansas Division of Correction from October 2014 to November 2021, without “direct access” to the prison’s law library.² (Doc. No. 1 at 4.) He says this denial of resources continued until he was transferred to BOP custody on November 22, 2021, or until he was released into general population on January 3, 2022. (*Id.* at 5-6.) Thus, he claims, the limitation period did not begin to run when the judgment became final; instead, it commenced either when the State-created impediment to filing was removed, under § 2244(d)(1)(B), or when the factual predicate of his claim could have been discovered through due diligence, under §

² Mr. Lewis says he had access to library materials “through a request form.” (Doc. No. 1 at 5.)

2244(d)(1)(D). Mr. Lewis is mistaken. Subsection 2244(d)(1)(B) requires that the impediment to filing created by the State be “in violation of the Constitution or laws of the United States” in order to trigger the later commencement of the limitation period. Even if Mr. Lewis could show his time in solitary confinement prevented him from filing, he cannot show it was unconstitutional. Additionally, as Respondent points out, the record shows that Mr. Lewis spent some periods in punitive isolation but did not spend the entirety of his ADC incarceration in solitary confinement. (Doc. No. 26-21.) Moreover, Mr. Lewis does not allege his lack of access to the law library prevented him from discovering the “factual predicate” of his claim, as is required for § 2244(d)(1)(D) to apply. In fact, the claim he raises in the instant Petition was also raised at trial and on direct appeal, which shows he was aware of the factual basis for the claim from the outset. *Lewis*, 2017 Ark. 211 at 4, 11-13, 521 S.W.3d at 470, 475-76.

Furthermore, a careful review of Mr. Lewis’s Petition fails to show any support for equitable tolling. Equitable tolling is only appropriate when a petitioner shows (1) he has been pursuing his rights diligently and (2) some extraordinary circumstance stood in the way of his filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Mr. Lewis has not made either showing. Even if he could show his lack of access to the law library hindered his efforts, equitable tolling is not warranted “[e]ven in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources.” *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000).

For these reasons, Mr. Lewis’s claim is time-barred. His Petition for Writ of Habeas Corpus should be dismissed with prejudice.

III. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, a district court “must issue or deny a certificate of appealability when it enters a

final order adverse to the applicant.” A certificate of appealability 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). I find no issue on which Mr. Lewis has made a substantial showing of the denial of a constitutional right. Accordingly, no certificate of appealability should issue.

IV. CONCLUSION

IT IS, THEREFORE, RECOMMENDED that:

1. Mr. Lewis’s § 2254 Petition for Writ of Habeas Corpus (Doc. No. 1) be DISMISSED with prejudice.

2. A certificate of appealability not be issued.

DATED this 27th day of February 2024.



JOE J. VOLPE
UNITED STATES MAGISTRATE JUDGE