

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

|                                    |   |                       |
|------------------------------------|---|-----------------------|
| DENNIS JAGGERS,                    | § |                       |
| <i>Petitioner,</i>                 | § |                       |
|                                    | § |                       |
| vs.                                | § | CIVIL ACTION H-06-633 |
|                                    | § |                       |
| NATHANIEL QUARTERMAN, DIRECTOR,    | § |                       |
| TEXAS DEPARTMENT OF CRIMINAL       | § |                       |
| JUSTICE, CORRECTIONAL INSTITUTIONS | § |                       |
| DIVISION,                          | § |                       |
| <i>Respondent.</i>                 | § |                       |

**MEMORANDUM AND RECOMMENDATION**

Dennis Jaggers’s petition for habeas corpus relief under 28 U.S.C. § 2254 has been referred to this court for report and recommendation. Respondent filed a motion for summary judgment (Dkt. 13), however Jaggers failed to respond. The court recommends that respondent’s motion for summary judgment be granted, and Jaggers’s petition be denied because it is time barred.

**I. Background**

Jaggers is an inmate of the Texas Department of Criminal Justice serving a ninety-nine year sentence for murder.<sup>1</sup> The First Court of Appeals in Houston, Texas affirmed the conviction on December 4, 2003.<sup>2</sup> Jaggers’s petition for discretionary

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<sup>1</sup> 339th District Court of Harris County, Texas (890358).

<sup>2</sup> *Jaggers v. State*, 125 S.W.3d 661 (Tex.App.–Houston [1st Dist.] 2003).

review was refused on April 28, 2004. Jagers did not file a writ of certiorari with the United States Supreme Court.

Jagers filed his state writ of habeas corpus application on August 1, 2005, and that writ was denied on January 25, 2006. Jagers filed the present federal petition for writ of habeas corpus on February 21, 2006, asserting the following errors: 1) trial court failed to suppress an audio tape of a statement made while in custody; 2) trial court failed to suppress an audio tape of a statement made while in custody that was involuntarily taken after having invoked the right to counsel; 3) trial court relinquished jurisdiction when it allowed the State's attorney to dismiss cause no. 887649; 4) Jagers was placed in double jeopardy when the court allowed the state to seek a new indictment after a jury had been selected in cause no. 887649; 5) a charge of a lesser offense was never submitted to the jury; and 6) trial court showed bias toward Jagers by denying him a free statement of facts. (Dkt. 1, pp. 11-12).

## **II. Analysis**

### **A. One-Year Statute of Limitations**

Jagers's federal petition is governed by the amendments to the federal habeas corpus statutes contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244.

The AEDPA provides as follows:

(d)(1) A 1-year period of limitation shall apply to an application for 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 postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Here, the one-year deadline for Jagers to file his petition began 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.” § 2244(d)(1)(A). Jagers’s state appeals ran their course when his petition for discretionary review was refused on April 28, 2004. Because Jagers did not seek a writ of certiorari from the United

States Supreme Court, the one-year deadline began to run on July 27, 2004, ninety days after entry of final judgment. SUP. CT. R. 13.1 (a petition for writ of certiorari must be filed within ninety days of entry of judgment).

Accordingly, Jagers had until July 27, 2005 to file his federal petition. His present federal petition was placed in the prison mailing system on February 21, 2006, a total of 209 days beyond the one-year limitations period. The petition is time barred unless statutory or equitable tolling applies.

### **B. Statutory Tolling**

The time during which a properly filed application for state habeas corpus or other collateral review is pending shall not be counted toward the one-year limitations period provided by 28 U.S.C. § 2244(d)(1). *See* 28 U.S.C. § 2244(d)(2). By the time Jagers's state habeas application was received and filed on August 1, 2005, some 370 days had already elapsed, exceeding the one-year limitations period.<sup>3</sup> Jagers does not satisfy any of the other statutory tolling grounds described in 28 U.S.C. § 2244(d)(1)(B)-(D). Accordingly, statutory tolling is of no benefit to Jagers's cause.

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<sup>3</sup> The Fifth Circuit does not apply the prison mailbox rule to state habeas applications. *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (“We decline to extend the mailbox rule to the determination of filing dates for state habeas applications. Instead, when a prisoner asserts that his ability to file a federal habeas petition has been affected by a state proceeding, we will examine the facts to determine whether the prisoner is entitled to equitable tolling under § 2244(d)(1).”).

One error offered by Jagers does require discussion; specifically a potential impediment to filing caused by State action. The one-year limitations period can run starting at “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.” 28 U.S.C. § 2244(d)(1)(B). Jagers asserts that the trial court showed bias toward him by denying a free transcript, or “statement of facts.”<sup>4</sup> (Dkt. 1, pp. 12, 22). Jagers appears to further assert that the denial of the free transcript served as an impediment by causing a delay in filing his state habeas application, which in turn affected his ability to timely file his federal petition within the one-year period of limitations.

An indigent prisoner is not entitled to a free statement of facts for use in seeking habeas corpus relief. *Escobar v. State*, 880 S.W.2d 782, 783 (Tex. App.–Houston [1st Dist. 1993]) (citing *United States v. MacCollom*, 426 U.S. 317, 322-23 (1976)).

[In Texas, a] prisoner . . . is not entitled to a free statement of facts merely for the purpose of searching it for grounds for a possible application for habeas corpus or other post-conviction relief. To obtain a free statement of facts, a prisoner . . . must make a showing that his

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<sup>4</sup> In Texas practice, the trial transcript is commonly referred to as a “statement of facts.” *Escobar v. State*, 880 S.W.2d 782, 783 n.1 (Tex. App.–Houston [1st Dist. 1993]).

habeas corpus action is not frivolous, and must demonstrate a specific need for the statement of facts.

*Id.* at 784.

It is important to recognize that any direct impediment came in relation to Jagers's state habeas application,<sup>5</sup> not his present federal petition.<sup>6</sup> Jagers asserts that he needed the free statement of facts "so as to have all the facts before filing his writ of habeas corpus." (Dkt. 1, p. 22). The timing of Jagers's request clearly demonstrates that it was not made in an effort to support a direct appeal or discretionary review by the court of appeals. Instead, this request by Jagers was an effort to scan the record for unspecified errors. The denial of Jagers's request for a free statement of facts was proper and did not serve as an impediment to filing his state habeas application or his present federal habeas petition. Accordingly, 28 U.S.C. § 2244(d)(1)(B) is inapplicable, and Jagers's federal petition is time barred by § 2244(d)(1)(A) as discussed above.

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<sup>5</sup> Jagers filed a motion with the Harris County District Clerk in an effort to attain a free statement of facts. (Dkt. 1, p. 22). Jagers's motion to the Clerk included an explanation that appellate review of his case was complete, and that the statement of facts was to be used for his habeas corpus application. *Id.*

<sup>6</sup> Jagers cites 28 U.S.C. § 753(b) to support his claim. (Dkt. 1, p. 24). Section 753 applies to requests for transcripts of federal proceedings. Jagers's complaint involves a denied request for state trial transcripts. Accordingly, § 753 is not applicable to Jagers's claim.

### **C. Equitable Tolling**

“Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Equitable tolling is invoked primarily “where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.” *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996); *Grooms v. Johnson*, 208 F.3d 488, 489-90 (5th Cir. 1999). Jagers has failed to adequately explain the delays in his efforts leading up to the present federal habeas petition. Similarly, Jagers has not suggested any extraordinary circumstances that impeded his efforts to file this petition.

### **III. Recommendation**

The court recommends that Jagers’s petition be DENIED as time barred.

The court further finds that Henderson has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack*, 529 U.S. at 484. Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions,

except for plain error. *See* 28 U.S.C. § 636(b)(1)(C); Rule 8(b) of the Rules Governing Section 2254 Cases.

Signed at Houston, Texas on September 28, 2006.

  
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Stephen Wm Smith  
United States Magistrate Judge