

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JAN 5 2000

PATRICK FISHER
Clerk

PHILLIP CORDOVA,

Plaintiff-Appellant,

v.

TIM LEMASTER, Warden, New Mexico
State Penitentiary; ATTORNEY
GENERAL FOR THE STATE OF NEW
MEXICO,

Defendants-Appellees.

No. 99-2257

(D.C. No. CIV-99-156 JP/LCS)
(N.M.)

ORDER AND JUDGMENT*

Before **SEYMOUR**, Chief Judge, **BALDOCK**, and **HENRY**, Circuit Judges.**

On January 5, 1982, Petitioner Phillip Cordova pled guilty in New Mexico state court to thirty separate counts in two indictments, including armed robbery and attempted first degree murder, each with firearm enhancements. On January 20, 1982, the district

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** After examining the briefs and appellate record, this 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)(2)(c); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

court sentenced Petitioner to nineteen years imprisonment on one of the armed robbery counts and ten years imprisonment on the attempted first degree murder count, with the sentences to run consecutively. The district court also sentenced Petitioner on the remaining twenty-eight counts, with those sentences to run concurrently with the armed robbery and attempted first degree murder sentences. Petitioner filed several unsuccessful motions for post-conviction relief in state court. On February 10, 1999, Petitioner mailed his federal habeas corpus petition in this case to the clerk of court.

In a thorough proposed findings and recommended disposition, a magistrate judge recommended denial of the petition as untimely. The magistrate judge concluded that because Petitioner's judgment and sentence became final prior to the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), the grace period allowed under United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997) applied. Under Simmonds, state prisoners whose convictions became final prior to April 24, 1996, must file their petitions within one year of the AEDPA's enactment. Id. The one year period of limitations, however, is tolled during the pendency of a properly filed application for state post-conviction relief or other collateral review. 28 U.S.C. § 2244(d)(2); see Hoggro v. Boone, 150 F.3d 1223, 1226 (10th Cir. 1998). Because Petitioner filed his federal habeas corpus petition more than one year after the New Mexico Supreme Court denied his application for a writ of review on January 6, 1998, the magistrate judge concluded Petitioner's petition was time barred.

After considering Petitioner's objections, the district court adopted the proposed findings and recommended disposition and denied Petitioner a certificate of appealability. See 28 U.S.C. § 2253(c). His renewed application is before us.

A petitioner may appeal the denial of a § 2254 petition only if "a circuit justice or judge" issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). We have thoroughly reviewed Petitioner's application for a certificate of appealability, his brief, the magistrate judge's proposed findings and recommended disposition, the district court's order adopting those proposed findings and recommended disposition, and the entire record before us. We conclude that Petitioner's petition is untimely substantially for the reasons set forth in the magistrate judge's proposed findings and recommended disposition. Accordingly, we deny his request for a certificate of appealability and dismiss the appeal.

CERTIFICATE OF APPEALABILITY DENIED; APPEAL DISMISSED.

Entered for the Court,

Bobby R. Baldock
Circuit Judge