

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 15, 2021

Christopher M. Wolpert
Clerk of Court

CHATHA TATUM,

Petitioner - Appellant,

v.

DAN SCHNURR,

Respondent - Appellee.

No. 20-3188
(D.C. No. 5:19-CV-03228-SAC)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HOLMES**, **BACHARACH**, and **MORITZ**, Circuit Judges.

This case involves a timeliness issue. The federal district court ruled that Mr. Chatha Tatum’s habeas petition was barred by the one-year period of limitations. *See* 28 U.S.C. § 2244(d). The court considered the statutory tolling provision, which excludes the time in which a properly filed post-conviction application has been pending. 28 U.S.C. § 2244(d)(2). But even

* Oral argument would not help us decide the appeal, so we have decided the appeal based on the record and the parties’ briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, *res judicata*, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

with exclusion of that time, the court concluded that Mr. Tatum had waited too long to seek federal habeas relief.

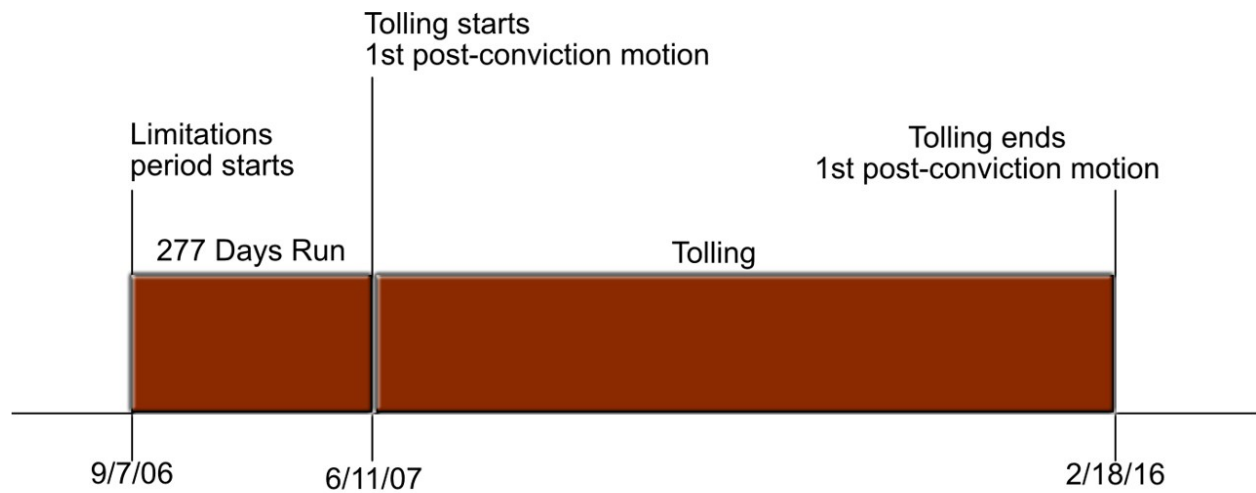
Timeliness turns on the prison mailbox rule. Under this rule, a prisoner's *pro se* documents are deemed "filed" when they are submitted to prison officials for mailing. *See Wahl v. State*, 344 P.3d 385, 388 (Kan. 2015). Invoking this rule, Mr. Tatum argued that he had filed his second state post-conviction motion on the day that he had allegedly given the motion to prison officials for mailing. The district court disagreed, concluding that Mr. Tatum had not filed his second state post-conviction motion until the date that he signed the certificate of service on a related motion (his motion to proceed *in forma pauperis*). This conclusion led the court to regard the federal habeas petition as untimely.

On appeal, Mr. Tatum argues that the federal district court erred by rejecting his argument for an earlier filing date. We agree with Mr. Tatum, reverse the district court's decision, and remand for further proceedings.

1. The federal district court dismissed Mr. Tatum's habeas petition as time-barred.

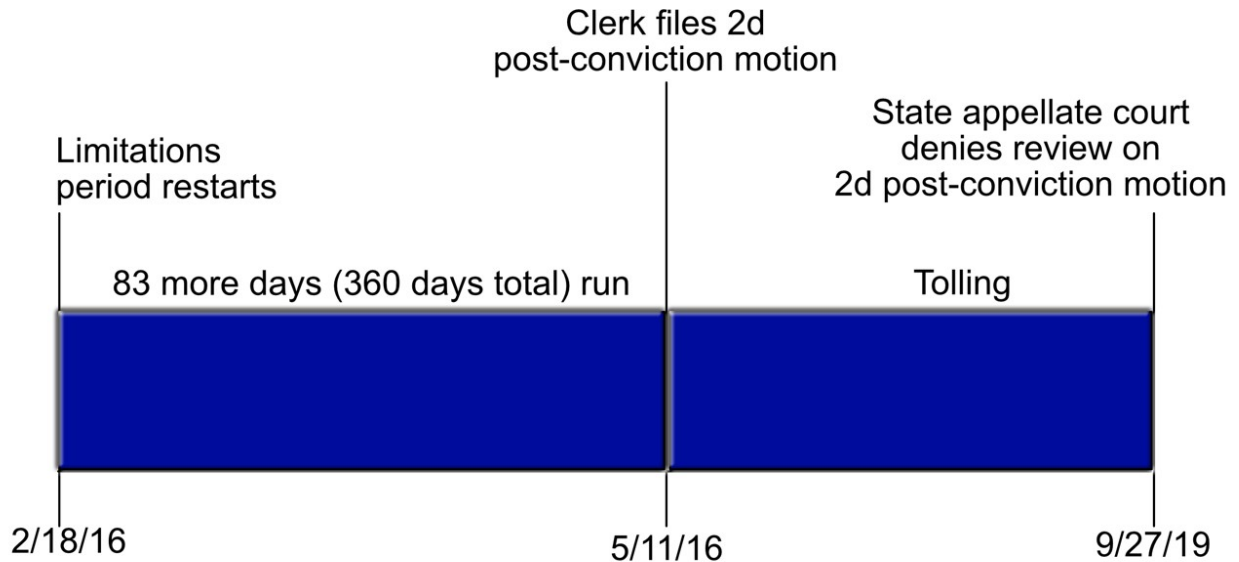
In state court, Mr. Tatum was convicted of first-degree murder and attempted murder. The Kansas Supreme Court affirmed. *See State v. Tatum*, 135 P.3d 1088 (Kan. 2006). Mr. Tatum then filed two post-conviction motions in state court. When these motions failed, he filed a federal habeas petition on November 1, 2019.

The respondent’s argument. In federal district court, the respondent argued that Mr. Tatum’s habeas petition was barred by the one-year limitations period. For this argument, the respondent said that the limitations period had started when Mr. Tatum’s convictions and sentence had become final (the day after the deadline for filing a petition for certiorari in the United States Supreme Court expired). When Mr. Tatum filed a post-conviction motion 277 days later, the limitations period stopped running. The state court proceedings ended roughly 8-1/2 years later (February 18, 2016), when the Kansas Supreme Court denied review.



At that point, the limitations period ran 83 more days (until the court clerk filed Mr. Tatum’s second post-conviction motion in a Kansas state court on May 11, 2016). The state proceedings ended when the Kansas Supreme Court denied review (September 27, 2019), and the limitations

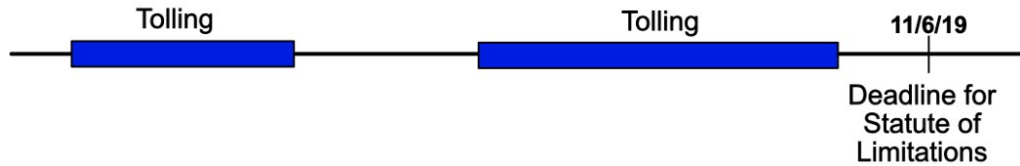
period again started to run. At that point, 360 days had run, leaving only five more days on the one-year limitations period.



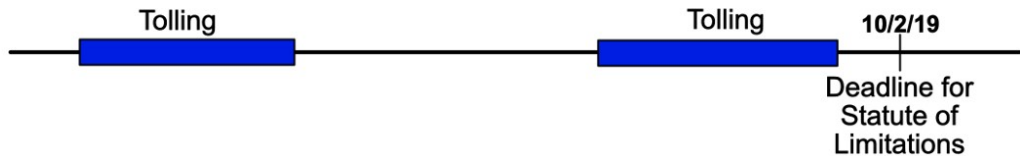
The fifth day fell on October 2, 2019, which is when the respondent says that the limitations period ended. (Mr. Tatum did not give the federal habeas petition to prison officials for mailing until almost a month later.)

Mr. Tatum’s argument. Mr. Tatum disagrees, arguing that the tolling should have started when he submitted the second post-conviction motion to prison officials—March 29, 2016—rather than May 11, 2016 (the date that the clerk filed the document). Using March 29, 2016, as the filing date, Mr. Tatum would have had until November 6, 2019, to seek habeas relief (37 more days than he would have had under the respondent’s timetable).

Tatum



Respondent



The district court’s determination. The federal district court ruled that Mr. Tatum’s habeas petition was time-barred. The court acknowledged that (1) Mr. Tatum’s second post-conviction motion had been signed on March 24, 2016, and (2) Mr. Tatum had stated that he delivered the second post-conviction motion to prison officials on March 29, 2016. But the court concluded that the second post-conviction motion hadn’t been filed on March 29, 2016. For this conclusion, the court’s reasoning was two-fold:

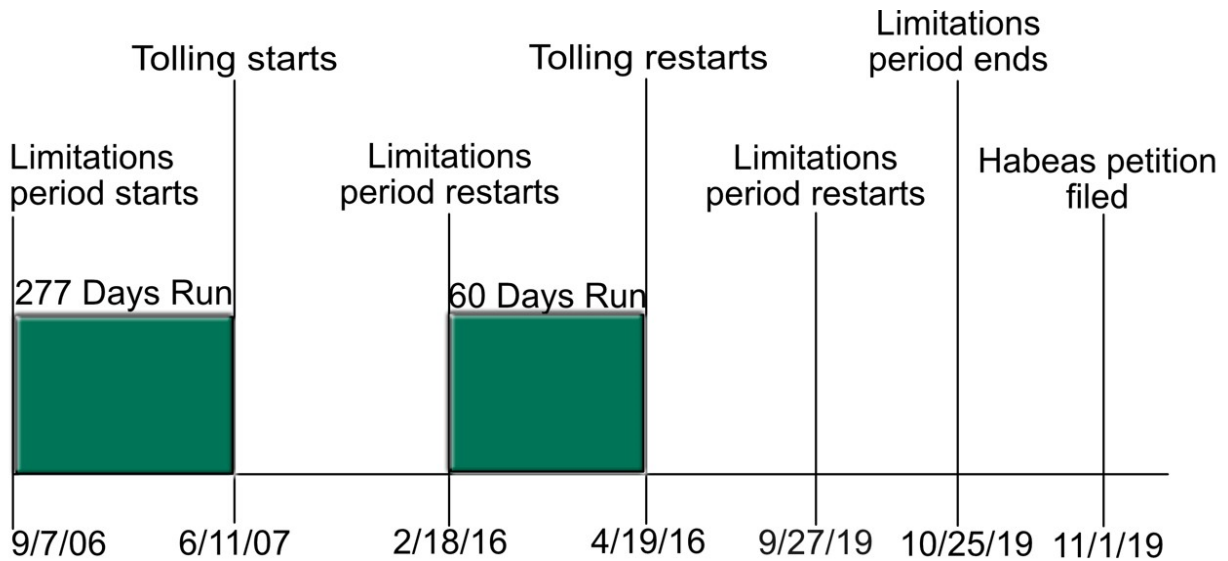
1. Mr. Tatum hadn’t said on the certificate of service when it was mailed.
2. The record was ambiguous.

The record showed a withdrawal for postage on March 29, 2016, but didn’t say what Mr. Tatum was mailing.

Rather than use March 29, 2016, as the filing date, the court relied on the date that Mr. Tatum had signed the certificate of service for his motion to proceed *in forma pauperis*—April 19, 2016. With that as the filing date, the habeas action was untimely:

[T]he certificate of service for the motion to proceed in forma pauperis is dated April 19, 2016. If the Court accepts that date as the proof of mailing, it follows that sixty days ran on the limitation period between February 19, 2016, and April 18, 2016, leaving twenty-eight days on the limitation period. Under this scenario, the limitation period began to run again on September 28, 2019, and expired on October 25, 2019.

R. at 115.¹



2. We conduct de novo review of the district court’s ruling.

On appeal, Mr. Tatum argues that the district court erred in applying the tolling rules. Mr. Tatum urges application of the prison mailbox rule to

¹ The district court later declined to reconsider this determination.

deem his second post-conviction motion filed on March 24, 2016, the date that he signed it.²

We review de novo the dismissal of a habeas petition as untimely. *United States v. Denny*, 694 F.3d 1185, 1189 (10th Cir. 2012). The timeliness of a habeas petition is an affirmative defense, *see Kilgore v. Att’y Gen. of Colo.*, 519 F.3d 1084, 1086 (10th Cir. 2008), and “the burden of proving all affirmative defenses rests on the defendant.” *Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007). The parties’ arguments about the tolling period and the prison mailbox rule require us to determine when Mr. Tatum’s second state court post-conviction motion was “properly filed.” *See* 28 U.S.C. § 2244(d)(2). This is a matter of state procedural law. *See Adams v. LeMaster*, 223 F.3d 1177, 1181 (10th Cir. 2000).

3. We apply the prison mailbox rule, as construed by Kansas courts.

Kansas courts apply the prison mailbox rule. *Wahl v. State*, 344 P.3d 385, 388 (Kan. 2015). “This rule deems a prisoner’s pro se documents ‘filed’ when he or she submits them to prison authorities for mailing.” *Id.* In determining this date of submission, Kansas courts consider the totality of circumstances, including the dates that motions and certificates of mailing have been signed and the dates that prisoners seek to withdraw

² In district court, Mr. Tatum stated that he had given the petition to prison officials on a different date: March 29, 2016. *See* R. at 100. Either date (March 24 or 29, 2016) would extend the tolling period enough to render his habeas petition timely filed.

funds for postage. *See, e.g., id.* (concluding that the date of the prisoner’s signature on the certificate of service controlled because “the State ha[d] presented no evidence to controvert the validity of this date”); *Logan v. State*, No. 122,215, 2020 WL 6108529, at *3 (Kan. Ct. App. Oct. 16, 2020) (unpublished) (using the date a prisoner signed a motion); *Waddell v. State*, No. 109,583, 2014 WL 3630218, at *6 (Kan. Ct. App. July 18, 2014) (unpublished) (considering the date that the prisoner signed a motion and affidavits and the date that he “had obtained an inmate account statement showing what funds he had available”). Contrary to the respondent’s suggestion here, the omission of a date on the certificate of service is not necessarily dispositive.

When considering dismissal of a prisoner’s post-conviction motion as untimely, Kansas courts require the state to make a conclusive showing. For example, in *Waddell v. State*, the Kansas Court of Appeals observed that “[n]either party [had] provide[d] any explanation for why these papers would be held by [the prisoner] for several days after they were prepared but not delivered to prison officials before the deadline.” 2014 WL 3630218, at *6. Because the record “strongly hint[ed]” that the papers had been delivered to prison officials before the deadline, the Kansas Court of Appeals concluded that the prisoner’s motion should have been considered timely. *Id.*; *see also Wahl*, 344 P.3d at 388 (using the date of submission urged by the prisoner—the certificate of service—because “the State ha[d]

presented no evidence to controvert the validity of this date”); *Rowell v. State*, 490 P.3d 78, 83 (Kan. Ct. App. 2021) (same).

4. The district court erred in applying the prison mailbox rule.

The last page of Mr. Tatum’s post-conviction motion contains his signature and a handwritten date—March 24, 2016. *See* R. at 117. A certificate of service appears on the same page. *Id.*

Despite the date of this signature, the district court pointed out that the certificate of service wasn’t dated. But the omission of a date on the certificate of service doesn’t shed light, one way or another, on when Mr. Tatum gave the petition to prison authorities for mailing. He requested withdrawal of money from his account to pay for postage. The request bears two signatures: Mr. Tatum’s on March 24, 2016, the other by the “Unit Team” on March 29, 2016. The form also contains a stamp stating “Received March 30, 2016 HCF Mailroom” and a United States Postal Service tracking number. *Id.*

Given the record as a whole, the State had not shown delivery to prison authorities as late as April 19, 2016. Mr. Tatum apparently delivered his second post-conviction motion to prison officials on March 29 or 30, 2016 (at the latest). The certificate of service for the motion for leave to proceed *in forma pauperis* is dated April 19, 2016, and the district court apparently assumes that Mr. Tatum had submitted the *in forma pauperis* motion and second post-conviction motion on the same

day. But this assumption is questionable. Why would Mr. Tatum have done everything required for his second post-conviction motion (signing and obtaining postage) on March 29, 2016, then wait until April 19, 2016, to deliver it to prison officials? *See Waddell*, 2014 WL 3630218, at *6.³

The district court and the respondent observe that Mr. Tatum's request for a withdrawal does not identify a particular document to be mailed. But the district court and the respondent give no reason to conclude that this unspecified document was something other than the second post-conviction motion. The form shows that Mr. Tatum presented a document for mailing to the clerk, who ultimately filed the post-conviction motion. There is no suggestion that Mr. Tatum had other litigation pending in that court. So the respondent has not shown submission of his second post-conviction motion later than March 30, 2016.

³ Mr. Tatum's failure to give his *in forma pauperis* motion to prison authorities when he gave them his post-conviction motion would not mean that the post-conviction motion had not been properly filed:

[A] movant's failure to pay the docket fee is not jurisdictional nor does the movant's failure to pay the docket fee require a district court clerk to reject filing the movant's [post-conviction] motion. Besides, rather than holding a movant's motion until he or she has paid the docket fee, a district court clerk should file the motion. This would allow the district court judge to dismiss the action if the movant later fails to pay the docket fee or fails to file a poverty affidavit.

Wilson v. State, 192 P.3d 1121, 1126 (Kan. Ct. App. 2008).

5. We reverse the district court’s decision and remand for further proceedings.

The respondent concedes that if Mr. Tatum had placed his second post-conviction motion in the prison mail system on March 29, 2016, “his federal habeas petition would have therefore been timely filed, with 47 days remaining.” Appellee’s Resp. Br. at 12–13. Proper application of the prison mailbox rule shows that Mr. Tatum submitted his second post-conviction motion to prison officials on March 30, 2016, at the latest. If Mr. Tatum filed his second post-conviction motion on March 30, 2016, triggering further tolling, Mr. Tatum’s federal habeas petition would not have been time-barred. We thus reverse and remand for further proceedings.

Entered for the Court

Robert E. Bacharach
Circuit Judge