

June 25, 2007

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III  
Clerk

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No. 06-10230  
Summary Calendar

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DAVID MICHAEL GORDON,

Petitioner-Appellant,

versus

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL  
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:02-CV-1095  
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Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:\*

David Michael Gordon, Texas prisoner # 877573, appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas petition based on the statute of limitations. Gordon was convicted following a guilty plea to aggravated sexual assault of a child under fourteen years and sexual assault of a child and was sentenced to terms of imprisonment of 45 years and 20 years.

We previously vacated the district court's denial of relief on the merits and remanded the case to the district court for

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

further proceedings regarding Gordon's ineffective assistance of counsel claims and the district court's timeliness ruling. On remand, following an evidentiary hearing, the district court determined that the petition was time-barred, but granted a certificate of appealability (COA) on the issue whether the statute of limitations should be equitably tolled. Gordon argues that the statute of limitations should be equitably tolled because the Texas Court of Criminal Appeals failed to give him official notice when his state habeas application was denied.

"Equitable tolling applies principally 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." Melancon v. Kaylo, [259 F.3d 401, 408 \(5th Cir. 2001\)](#) (internal quotation marks omitted). Equitable tolling does not apply if the petitioner does not diligently seek habeas relief. [Id.](#)

The district court's decision not to apply equitable tolling was not an abuse of discretion. Gordon did not file his state application for over nine months, he did not provide the state court with his mailing address when he arrived at the Robertson Unit, and his federal petition was not filed until two months after he received notice that his state application was denied. Although the State's delay was a factor to consider in determining the equitable tolling issue, Gordon's ultimate failure to act with due diligence precludes the application of

equitable tolling. Phillips v. Donnelly, 216 F.3d 508, 511 (5th Cir. 2000). Thus, the district court did not abuse its discretion in failing to apply the doctrine of equitable tolling. Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999).

Because a ruling on the time-bar issue is dispositive of the case, further briefing is not required. The judgment of the district court is AFFIRMED. Gordon's motion for a COA and motion to stay the ruling on his COA motion are DENIED as unnecessary.