

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11874
Non-Argument Calendar

D. C. Docket No. 1:19-cv-04544-ELR

JASON QUINARD BAILEY,

Petitioner - Appellant,

versus

HAYS STATE PRISON,
WARDEN,

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(August 6, 2021)

Before MARTIN, ROSENBAUM, and BRANCH, Circuit Judges.

PER CURIAM:

Jason Bailey, proceeding *pro se*, appeals the district court's order dismissing his 28 U.S.C. § 2254 petition as untimely. On appeal, the state concedes that Bailey's § 2254 petition is timely and that the case should be remanded for

consideration of the merits. Based on that concession, Bailey has filed a motion for “summary judgment” requesting that we vacate the dismissal of his petition as untimely. After careful review, we reverse the dismissal of Bailey’s petition as untimely and remand for further proceedings.

I.

In September 2019, Bailey, a Georgia state prisoner, filed *pro se* a § 2254 federal habeas corpus petition. The state moved to dismiss the petition as untimely, contending that Bailey had failed to file a federal petition or a state collateral attack within one year of the date his convictions became final in November 2017, because he did not file a state habeas corpus petition until December 2018. Bailey countered that he mailed his state habeas petition in October 2018, and that the prison mailbox rule should apply to make his filing timely.

The district court initially denied the state’s motion to dismiss, relying on the prison mailbox rule. But it subsequently granted the state’s motion for reconsideration and dismissed Bailey’s § 2254 petition as untimely, finding that the prison mailbox rule did not apply to Bailey’s state habeas filing based on Georgia Supreme Court precedent. *See Roberts v. Cooper*, 691 S.E.2d 875, 876 (Ga. 2010) (holding that the prison mailbox rule does not apply to an initial state habeas petition).

Bailey timely filed a notice of appeal and also moved for reconsideration of the judgment, asserting for the first time that he had filed two timely motions to modify his sentence in October 2017 and December 2017, which were denied in January 2018. Bailey contended that, therefore, his one-year limitation period did not end until January 2019, making his federal habeas petition timely regardless of the prison mailbox rule.

The district court issued an order finding that Bailey's federal habeas petition would still be untimely despite his timely motions to modify his sentence, but it granted a certificate of appeal ("COA") on the issue of whether Bailey was entitled to rely on the prison mailbox rule to make his federal habeas petition timely.¹ Bailey filed a notice of appeal of that order and moved for reconsideration, asserting that the two motions to modify, when combined with his state habeas petition, rendered his § 2254 petition timely. In response, the district court recognized that Bailey may be correct but that it was divested of jurisdiction to resolve that issue because of this appeal.

¹ After the district court issued this COA, we remanded the appeal so the district court could include "what constitutional issue jurists of reason would find debatable" under *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014). On remand, the district court identified a qualifying constitutional issue and once again granted Bailey a certificate of appeal on whether the prison mailbox rule applied to his Georgia habeas filings.

II.

On appeal, the state maintains that the district court properly declined to apply the prison mailbox rule when determining the operative filing date for Bailey's state habeas petition. However, it concedes that Bailey is correct that the motions to modify his sentence were tolling motions and that they "rendered his federal petition timely when added to the tolling provided by his state habeas corpus petition." We need not consider whether the prison mailbox rule applies because, even assuming it does not, we agree with the parties that the § 2254 petition is timely.²

We review *de novo* a district court's dismissal of a habeas corpus petition as untimely. *Morris v. Sec'y, Fla. Dep't of Corr.*, 991 F.3d 1351, 1353 (11th Cir. 2021).

Under 28 U.S.C. § 2244(d)(1), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a one-year statute of limitations period that begins to run on the latest of four triggering events governs § 2254 petitions for federal habeas corpus. The relevant triggering event here is "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). And "a properly filed application

² Although the COA granted by the district court was limited to the prison mailbox issue, not to issues of timeliness more generally, "we may expand a COA sua sponte to include issues that reasonable jurists would find . . . debatable." *Mays v. United States*, 817 F.3d 728, 733 (11th Cir. 2016) (quotation marks omitted). We conclude that expansion of the COA is clearly warranted here because the state conceded for the first time on appeal that Bailey's § 2254 petition was timely, and the district court indicated that it would have reconsidered its timeliness ruling but for this appeal.

for State post-conviction or other collateral review” tolls the one-year limitation period for filing a federal habeas petition. 28 U.S.C § 2244(d)(2). The Supreme Court has held that “collateral review” in § 2244(d)(2) refers to “judicial review that occurs in a proceeding outside of the direct review process.” *Wall v. Kholi*, 562 U.S. 545, 560 (2011).

Here, we agree with the parties that Bailey’s § 2254 petition is timely. It is undisputed that Bailey’s convictions became “final” for AEDPA-limitations purposes on November 29, 2017. In the state court, on October 2, 2017, and December 22, 2017, Bailey filed two timely motions to modify his sentence, which the state court denied on January 19, 2018. Neither motion is part of the record, but the state concedes that these motions, which were denied on the merits by a state judge after Bailey had already pursued direct criminal relief, tolled the limitations period. We accept the state’s concession on this point, which is supported by the available record evidence. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012) (explaining that courts should accept a state’s intentional concessions on AEDPA statute of limitations issues).

Because a tolling motion was filed before Bailey’s convictions became “final,” his one-year AEDPA limitations period began to run no earlier than January 19, 2018, when the tolling motion was denied. As a result, it is unnecessary to determine whether the prison mailbox rule applied to Bailey’s Georgia habeas

petition, because both filing dates—October 1, 2018, or December 5, 2018—fall within the statute-of-limitations period. Thus, Bailey’s state habeas corpus petition was timely filed and tolled the operation of the limitations period, rendering his instant § 2254 petition timely. *See* § 2244(d)(2).

For these reasons, we reverse the dismissal of Bailey’s § 2254 petition as untimely and remand for further proceedings consistent with this opinion.³

REVERSED AND REMANDED.

³ Bailey’s motions for oral argument and for summary judgment are **DENIED** as moot.