IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20251
USDC No. 4:16-CV-1259

A True Copy
Certified order issued Dec 26, 2017
Tyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

JERMAINE DEWITT CHANEY,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Texas

ORDER:

Jermaine Dewitt Chaney seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 habeas petition filed April 30, 2016 as time-barred. Chaney concedes that his one-year period limitations period for filing a habeas petition under 28 U.S.C. § 2244(d)(1) ended on May 25, 2010, but argues that the district court erred in failing to find an exception to the time bar based on his claim of actual innocence.

To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Where the district court denies habeas relief on procedural grounds, the movant must demonstrate that reasonable jurists

App. A

would find it debatable whether the motion states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Id.* at 484.

Actual innocence, if proven based on new evidence, permits a petitioner to bring a § 2254 petition despite expiration of the limitations period. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2014). However, "tenable actual-innocence [exceptions] are rare: A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* (citations omitted).

Here, the district court considered what Chaney characterized as new evidence of his innocence alongside the evidence presented at his trial, and determined that Chaney had not established that, in light of the allegedly new evidence, no juror, acting reasonably, would have voted to find him guilty. *Id.* In his motion for a COA before this court, Chaney has not made the requisite showing that a reasonable jurist would find this determination debatable or wrong. Accordingly, his motion for a COA is DENIED. His motion for appointment of counsel and to present oral argument are consequently also DENIED. *See Schwander v. Blackburn,* 750 F.2d 494, 502 (5th Cir. 1985).

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

App. A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERMAINE DEWITT CHANEY, TDCJ #01496462, Petitioner, VS. LORIE DAVIS, Respondent.	§ § § § § § § §	CIVIL ACTION NO. H-16-1259

MEMORANDUM AND ORDER

Petitioner Jermaine Dewitt Chaney ("Chaney"), a state inmate, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction for murder. (Docket Entry No. 1). Respondent has filed a Motion to Dismiss (Docket Entry No. 10), to which Chaney has filed a response (Docket Entry No. 11). After considering all of the pleadings, the record, and the applicable law, the Court will grant Respondent's motion and dismiss this habeas petition as barred by limitations.

I. BACKGROUND

Chaney is currently incarcerated in Texas Department of Criminal Justice, Correctional Institutions Division ("TDCJ") as a result of a judgment and sentence of the 338th District Court of Harris County, Texas, in cause number 1113820.[1] Chaney entered a plea of not guilty on March 4, 2008 and was convicted of murder after a jury trial on March 7, 2008.[2] The jury

[1] Petition, Docket Entry No. 1, at 2-3; Docket Entry No. 9-24 at 32 (Judgment of Conviction by Jury). Unless otherwise specified, all references to page numbers correspond to the pagination provided in the CM/ECF header of each document cited.

[2] Petition, Docket Entry No. 1, at 2-3; Docket Entry No. 9-6 at 5, Recorder's Record ("RR"), Vol. 3 at 5.

assessed Chaney's sentence at 60 years' imprisonment.[3]

On direct appeal, Chaney argued that the trial court erred in admitting hearsay through the testimony of two witnesses, the evidence was legally and factually insufficient to support his conviction, and he received ineffective assistance of counsel. *Chaney v. State of Texas*, No. 01-08-00204-CR, 2009 WL 1086952, at *1 (Tex. App.—Houston [1st Dist.] Apr. 23, 2009, no pet.) (unpublished op.). On April 23, 2009, the intermediate state court of appeals rejected Chaney's arguments and affirmed the conviction, summarizing the facts and evidence presented at trial, as follows:

> On March 8, 2007, Daniel Santan King, Garrett Thomas, and the complainant, Anthony White, were together at the home where Thomas resided. King had just purchased some crack cocaine when he left the room briefly to answer the front door. When he returned, he discovered that some of his cocaine was missing, and he suspected that the complainant had taken it. He left Thomas's home and went to the house next door. According to Thomas, King then asked Thomas to meet with him, and, at this meeting, King asked Thomas to kill the complainant for taking the cocaine. Thomas refused to do so and left the house.
>
> Several hours later, early in the morning of March 9, 2007, the complainant arrived at the home of Thelma Leifester. Eventually, the complainant called King and asked him for a ride home and then went to Leifester's bedroom to wait for his ride. After hearing a knock on the door, Leifester opened it. She asked the man at the door if he were King, and the man replied that he was looking for the complainant. Leifester told the man that the complainant was in the bedroom and pointed the way. The man walked back to the bedroom, Leifester heard a gun shot and a thud, then the man walked back to the front of her house, asked to be let out, and left.
>
> Leifester then ran to her bedroom and discovered the complainant lying face down on the floor. Another resident at the home, Rebecca McAdams, had been in her own bedroom when she heard, but did not see, a man enter the house and the sound of a gunshot. McAdams left her room to find out what had happened. She saw the complainant lying on the bedroom floor and called the police. Paramedics took the complainant to a local hospital where he died the next day of a gunshot wound to the head.

[3] Petition, Docket Entry No. 1, at 2; Docket Entry No. 9-2 at 54, Clerk's Record ("CR") at Bates No. 00103.

> Leifester viewed several photo spreads during the police investigation of the shooting. She finally identified [Chaney] as the shooter. Antoinette Miller, King's wife, also provided information to police regarding the involvement of her husband and [Chaney].
>
> At trial, Garrett Thomas testified about the events of March 8, 2007 leading up to the shooting, including King's suspicion that the complainant had stolen cocaine from him and King's attempts to get Thomas to kill the complainant. Leifester testified regarding the events that occurred in her home on the morning of March 9, 2007, and she identified [Chaney] in court as the man who came to the door looking for the complainant, walked back to the bedroom where the complainant was waiting and was subsequently shot, and then left. Leifester also testified about her involvement in the police investigation, including her having viewed several photo spreads and identifying [Chaney] in one of them.
>
> Makeba Thomas, a former cell-mate of [Chaney], testified that [Chaney] told him about the details of the shooting. Makeba Thomas stated that [Chaney] told him that King thought the complainant had stolen some cocaine from him. When King found out that the complainant was at Leifester's house, he sent [Chaney] there to kill the complainant. Makeba Thomas testified that [Chaney] told him that he knocked on the door, walked back to the bedroom where the complainant was waiting and shot him, then left the house running. On cross-examination, Makeba Thomas testified that [Chaney] spoke to him regarding the details of his case because [Chaney] was seeking unofficial legal counsel from Makeba.
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> Antoinette Miller, King's wife, also testified at [Chaney] 's trial. She testified that King told her that the complainant had stolen cocaine from him and that he sent [Chaney] to kill him. Miller further testified that she shared this information with police after she had an altercation with King.
>
> [Chaney] testified on his own behalf. He testified that he never told Makeba Thomas that he killed the complainant; rather, he gave Makeba Thomas the details of the case against him based on the police offense report in order to seek unofficial legal advice. He also testified that he had never seen Leifester or McAdams before the trial began and that he did not know the complainant at all.

Chaney v. State, 2009 WL 1086952, at *1–2. The Texas court of intermediate appeals overruled all of Chaney's issues and affirmed the judgment of the district court on April 23, 2009. *Id.* at *3-11. Chaney did not file a petition for discretionary review in the Texas Court of Criminal Appeals or a petition for writ of certiorari with the United States Supreme Court.[4]

[4] Petition at 3.

On or around May 5, 2015, Chaney filed a state application for writ of habeas corpus under article 11.07 of the Texas Code of Criminal Procedure in the 338th District Court of Harris County, Texas, in cause number WR-84,266050-01.[5] After receiving the State's response and an affidavit from trial defense counsel, the state habeas court adopted the State's proposed findings of fact and conclusions of law and recommended that relief be denied on November 4, 2015.[6] On February 10, 2016, the Texas Court of Criminal Appeals denied Chaney's application without written order based on the findings of the trial court.[7]

On April 30, 2016, Chaney executed the pending petition for a writ of habeas corpus under § 2254.[8] Among other things, Chaney contends that he is actually innocent and was denied due process of law at trial. Regarding his actual innocence claim, Chaney contends that another person, Daniel S. King, made a credible declaration of guilt; the prosecutor withheld exculpatory statements; and the prosecutor withheld evidence of deals with witnesses.[9] Chaney also claims that his trial counsel was constitutionally ineffective; that the trial court abused its discretion by allowing hearsay testimony; and that the evidence was legally insufficient to prove that he was the person who committed the crime.[10] Chaney contends further that his claim of actual innocence serves as an exception to the statute of limitations, providing a gateway through

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[5] Docket Entry No. 9-22 at 22, State Habeas Corpus Record ("SHCR") at Bates No. 00018-19 (application executed on May 5, 2015); *see also* Petition at 4 (stating that Petitioner filed his state habeas application on May 11, 2015).

[6] Docket Entry No. 9-24 at 8-28, Findings of Fact and Conclusions of Law, SHCR at Bates No. 00147-69.

[7] Petition at 4.

[8] *Id.* at 10.

[9] *Id.* at 6.

[10] *Id.* at 6-7.

which his constitutional claims may be considered on the merits.[11] Respondent has filed a Motion to Dismiss based on the governing statute of limitations, and Chaney has filed a response in opposition. The § 2254 proceeding is ripe for adjudication.

II. THE ONE-YEAR STATUTE OF LIMITATIONS

This federal habeas corpus proceeding is governed by the Anti-terrorism and Effective Death Penalty Act (the "AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). According to the AEDPA, Chaney's federal habeas corpus petition is subject to a one-year limitations period found in 28 U.S.C. § 2244(d). Because Chaney challenges a state court judgment of conviction, the statute of limitations for federal habeas corpus review began to run at "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).

Chaney's direct review concluded and his conviction became final for the purposes of federal habeas corpus review on May 25, 2009, when the time to file a petition for discretionary review in the Texas Court of Criminal Appeals expired. *See Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003) (holding that a state court conviction becomes final for the purposes of the AEDPA at the conclusion of direct review, *i.e.*, when either (1) the United States Supreme Court rejects a certiorari petition or rules on the merits or (2) time for seeking such review expires); *see also* Tex. R. App. P. 68.2(a) (requiring that a petition for review be filed within 30 days after either the date of the judgment in the court of appeals or the date a timely filed motion for rehearing was overruled). That date triggered the statute of limitations for purposes of federal review, which expired one year later on May 25, 2010. *See* 28 U.S.C. §2244(d)(1)(A). Petitioner's pending federal habeas corpus petition, filed on April 30, 2016, is nearly six years

[11] *Id.* at 9.

too late and is therefore time-barred unless an exception applies.

Chaney does not attempt to establish a basis for statutory tolling and the record does not disclose any. *See* 28 U.S.C. § 2244(d)(1)(A)-(D). Likewise, he offers no explanation for his delay in seeking federal review and he does not otherwise show that equitable tolling is warranted. *See Holland v. Florida*, 560 U.S. 631, 645, 649 (2010); *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005). Instead, Chaney attempts to request an exception to the statute of limitations because he claims he has new evidence to show that he is "actually innocent" as a gateway to consideration of his constitutional claims on the merits.[12]

The Supreme Court has held that a defendant who demonstrates actual innocence of his crime of conviction may be excused for failing to comply with the one-year statute of limitations on federal habeas corpus review. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013). A habeas petitioner who seeks to overcome a procedural default through a showing of actual innocence must "raise a substantial doubt about his guilt." *Dowhitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000). To establish an actual innocence claim in this context, a habeas petitioner must present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). A "properly supported" claim of actual innocence requires a showing that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 326; *McQuiggin,* 133 S. Ct. at 1933, 1935; *see also House v. Bell*, 547 U.S. 518, 538 (2006). The Supreme Court emphasized that the actual innocence exception "applies to a severely confined category" of cases and that the standard set forth in *Schlup* is "demanding." *McQuiggin*, 133 S. Ct. at 1933, 1936. "The gateway should open only

[12] Docket Entry 1-1 at 6-16.

when a petition presents 'evidence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" *Id.* at 1936 (quoting *Schlup*, 513 U.S. at 316).

Chaney does not meet the demanding standard articulated in *Schlup* and *McQuiggin* to show that he is actually innocent of the crime of conviction because he submits no new, competent evidence that is probative of his possible innocence, much less "evidence so strong that a court cannot have confidence in the outcome of the trial." *Id.* In that regard, Chaney contends that he has presented two pieces of "evidence"[13] which exonerate him: (1) King's plea of guilty in 2009 to the shooting of White; and (2) King's exculpatory statement that "Jermaine Chaney had nothing to do with this crime."[14] Taking the trial record as a whole and considering the new "evidence," the Court finds, as set forth below, that Chaney fails to establish that it is "more likely than not that no reasonable juror would have convicted him." *McQuiggin,* 133 S. Ct. at 1933, 1935; *Schlup*, 513 U.S. at 326.

A. King's Plea of Guilty

The trial record in Chaney's case reflects that the jury was made aware of King's complicity in the murder and his role in ordering Chaney to carry out the shooting. *See Chaney*, 2009 WL 1086952, at *1–2 (recounting that Antoinette Miller, Makeba Thomas, and Garrett Thomas, among others, all testified at trial to the involvement of both Chaney and King in White's murder). Nothing in King's affirmation of his own guilt exonerates or excludes Chaney as an actor who was also criminally responsible for the crime. Under Texas law, "[a] person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by

[13] Docket Entry No. 1-1 at 6 ("The Petitioner presented two pieces of new and reliable evidence in his State Application for Writ of Habeas Corpus.").

[14] *Id.* at 6-7.

the conduct of another for which he is criminally responsible, or by both." Tex. Penal Code § 7.01(a). King's plea of guilty does not exclude Chaney from his role as the shooter in the murder of Anthony White, where the State argued and presented evidence at trial to show that both individuals were criminally responsible for the murder. Accordingly, King's subsequent plea of guilty does not exclude or exonerate Chaney in the murder of Anthony White. Therefore, King's affirmation of guilt is not probative evidence of Chaney's innocence.

B. King's Purported "Statement" Exculpating Chaney

Chaney claims that King stated that "Jermaine Chaney had nothing to do with this crime."[15] For proof, Chaney points to an August 3, 2010 letter to King, written by David R. Dow of the Texas Innocence Network, asking King to confirm that he said this statement.[16] The letter requested a response from King by October 15, 2010 and stated that, if King failed to respond, the Texas Innocence Network would have to close the case and not pursue it further.[17] There is no indication, ***at all***, that King ever responded, submitted an affidavit, or presented any form of competent evidence to support the notion that he ever made this statement.

Chaney submits his own statement, entitled "Affidavit of Jermaine Dewitt Chaney," claiming that on or around September 22, 2009, the prosecutor told Chaney that King had told the prosecutor that Chaney did not have anything to do with the murder.[18] Aside from the multiple layers of hearsay and the self-serving nature of Chaney's own statement attempting to exonerate himself, the Fifth Circuit has held that "[a]bsent evidence in the record, a court cannot

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[15] Docket Entry No. 1-1 at 7.

[16] *See id.*; Docket Entry No. 1-2 at 6 (Letter to King from David Dow).

[17] Docket Entry No. 1-2 at 6.

[18] Docket Entry No. 1-2 at 8.

consider a habeas petitioner's bald assertions on a critical issue in his pro se petition (in state and federal court), unsupported and unsubstantiated by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle,* 694 F.2d 1008, 1011–12 and n.2 (5th Cir. 1983); *see Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990). Additionally, Chaney's statement, dated April 30, 2016, was made over five years after the alleged conversation with the prosecutor even took place; this has some bearing on the Court's assessment of the reliability of the evidence. *See McQuiggin*, 133 S. Ct. at 1936 ("Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing."). Thus, the Court finds that Chaney's uncorroborated, untimely statement lacks probative evidentiary value and lacks the indicia of reliability. *See, e.g., Bosley v. Cain*, 409 F.3d 657, 664 (5th Cir. 2005) (explaining that a federal habeas court may consider the timing and credibility of the affiant in assessing reliability of evidence).

Likewise, to the extent that Chaney alleges that the prosecutor did not disclose deals made with witnesses, Chaney presents no evidence to support this claim. The record reflects that witnesses were questioned at trial about their criminal backgrounds, if applicable, and were asked if they were promised anything from the State in exchange for their testimony. Each witness was also subject to cross examination in front of the jury, who heard their testimony and assessed their credibility.[19] Chaney has failed to meet his burden to establish actual innocence with new reliable evidence as is required under the standard in *McQuiggin* and *Schlup.*

Because Chaney does not present any new evidence showing that he is actually innocent

[19]*See, e.g.*, Docket Entry No. 9-7 at 9-11, RR Vol. 4 at 23-32 (cross-examination of Makeba Thomas); *id.* at 18-21, RR Vol. 4 at 60-67 (cross examination of Garrett Thomas); *id.* at 31-37, RR Vol. 4 at 110-133 (cross examination of Thelma Leifester); Docket Entry No. 9-8 at 14-16, RR Vol. 5 at 39-48 (cross examination of Rebecca McAdams); *id.* at 32-33, RR Vol. 5 at 112-117 (cross examination of Antoinette Miller).

of his offense, the exception outlined in *McQuiggin* does not apply. *See Schlup*, 513 U.S. at 316 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim."). Moreover, Chaney has not shown that it is more likely than not that no reasonable juror would have convicted him in light of the alleged "new" evidence based on the record as a whole, *id.* at 327, and he does not allege or establish any other basis for statutory or equitable tolling. Accordingly, the petition must be dismissed as barred by the governing statute of limitations in AEDPA.

III. CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases now requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. A certificate of appealability will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard, this requires a petitioner to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing 28 U.S.C. §2253(c)(1)). Where denial of relief is based on procedural grounds, the petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S.

at 484.

A district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). For reasons set forth above, this Court concludes that jurists of reason would not debate whether any procedural ruling in this case was correct or whether the petitioner states a valid claim for relief. Therefore, a certificate of appealability will not issue.

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court **ORDERS** as follows:

1. The Respondent's Motion to Dismiss (Docket Entry No. 10) is **GRANTED**.
2. The habeas corpus petition filed by Jermaine Dewitt Chaney (Docket Entry No. 1) is **DISMISSED** with prejudice as barred by limitations.
3. A certificate of appealability is **DENIED.**
4. All other pending motions, if any, are **DENIED**.

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas, this 23rd day of March, 2017.

Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.