

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50995

In re: MICHAEL BOONE,

Movant

Motion for an order authorizing
the United States District Court for the
Western District of Texas to consider
a successive 28 U.S.C. § 2254 application

Before JONES, DENNIS, and HIGGINSON, Circuit Judges.

PER CURIAM:

Michael Boone, Texas prisoner # 915679, moves this court for authorization to file a successive 28 U.S.C. § 2254 application to challenge his two 20-year consecutive sentences for aggravated sexual assault of a child. Boone contends that his current sentence is unconstitutionally void because the trial judge failed to inform the jury that consecutive sentences could be imposed for his convictions. Boone also contends that his sentence violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). Citing *McQuiggin v. Perkins*, 569 U.S. 383 (2013), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), Boone further contends that he should be allowed to file a successive § 2254 application because he is actually innocent of the 20-year sentence he is currently serving.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a prisoner must obtain authorization from this court before filing a second or

successive habeas application in the district court. 28 U.S.C. § 2244(b)(3)(A). This court may authorize the filing of a successive § 2254 application only if Boone makes a *prima facie* showing that either (1) his claims rely on a new rule of constitutional law that was made retroactive to cases on collateral review by the Supreme Court and was previously unavailable, or (2) the factual predicate for the claims could not have been discovered previously through due diligence, and the underlying facts, if proven, would establish by clear and convincing evidence that, but for the constitutional error, no reasonable trier of fact would have found the applicant guilty of the underlying offense. *See* § 2244(b)(2), (b)(3)(C).

Boone has not asserted previously undiscoverable facts demonstrating that no reasonable factfinder would have found him guilty of aggravated sexual assault of a child. *See* § 2244(b)(2)(B)(ii). As for his claim that he is actually innocent, this court “does not recognize freestanding claims of actual innocence on federal habeas review.” *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009). To the extent that he attempts to use actual innocence as a gateway to file a successive § 2254 application, and assuming there is such an exception, his effort is unavailing. *See Perkins*, 569 U.S. at 386; *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Boone’s reliance on *Montgomery* is also unavailing. In *Montgomery*, the Supreme Court made the holding of *Miller v. Alabama*, 567 U.S. 460 (2012), retroactively applicable to cases on collateral review. *Montgomery*, 136 S. Ct. at 736. The holding of *Miller* restricts itself to mandatory life sentences without the possibility of parole imposed upon juvenile offenders. *Miller*, 567 U.S. at 479-80. Because Boone did not receive such a sentence, *Miller* has no bearing on the constitutionality of his 20-year consecutive sentences. Additionally, Boone’s reliance on *Apprendi* and *Blakely* is also unavailing since

those cases have not been made retroactively applicable to cases on collateral review. *See In re Kemper*, 735 F.3d 211, 212 (5th Cir. 2013); *In re Elwood*, 408 F.3d 211, 213 (5th Cir. 2005).

Accordingly, IT IS ORDERED that Boone's motion for authorization to file a successive § 2254 application is DENIED. Boone has also filed motions to recuse the Honorable Judge Priscilla R. Owen and for review by a three-judge panel. These motions are DENIED AS MOOT.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

March 12, 2018

#915679
Mr. Michael Boone
CID Hughes Prison
RR 2 Box 4400
Gatesville, TX 76597-0000

No. 17-50995 In re: Michael Boone
USDC No.

Dear Mr. Boone,

28 U.S.C. Section 2244(b)(3)(E) does not permit review of the denial of your request to file a successive petition. We are taking no action on this document.

Sincerely,

LYLE W. CAYCE, Clerk

Cindy M. Broadhead
By: Cindy M. Broadhead, Deputy Clerk
504-310-7707

(16)

Appx. A-(2)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-51294
USDC No. 5:14-CV-1009



A True Copy
Certified order issued Jul 02, 2015

MICHAEL BOONE,

Tyke W. Cawce
Clerk, U.S. Court of Appeals, Fifth Circuit

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the
Western District of Texas, San Antonio

O R D E R:

Michael Boone, Texas prisoner # 915679, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 application as an unauthorized successive application and, alternatively, as time-barred. Boone filed the application to challenge his consecutive 20-year sentences for aggravated sexual assault of a child. Before this court, Boone renews his claim that he is actually innocent of his sentences because the judge failed to inform the jury that the sentences could be imposed consecutively. Citing *McQuiggin v. Perkins*, 133 S. Ct. 1942 (2013), Boone contends that his claim of actual innocence should be addressed "no matter how many writs have been filed when the issue has never been addressed."

(17)

Appx. A-(3)

No. 14-51294

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court's denial of § 2254 relief is based on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). An applicant satisfies this standard by showing that "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Boone has not met this standard. See *Slack*, 529 U.S. at 484. Accordingly, his request for a COA is denied. Boone's motion to proceed in forma pauperis on appeal is also denied.

MOTIONS DENIED.

/s/ Priscilla R. Owen
PRISCILLA R. OWEN
UNITED STATES CIRCUIT JUDGE

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Appx. A-(3)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-51294

MICHAEL BOONE,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court for the
Western District of Texas, San Antonio

Before SMITH, DENNIS and OWEN, Circuit Judges.

PER CURIAM:

A member of this panel previously denied Appellant's motions for certificate of appealability and to proceed in forma pauperis. The panel has considered Appellant's petition for rehearing en banc as a motion for reconsideration of the denial of Appellant's motion for certificate of appealability. IT IS ORDERED that the motion is DENIED.

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Appx. A-(3)

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION**

DISMISSAL ORDER

Petitioner Michael Boone's 28 U.S.C. § 2254 Habeas Corpus Petition challenges his two Kerr County convictions in 2000 for aggravated sexual assault of a minor and his concurrent twenty year sentences in *State v. Boone*, No. B-99-104 (Tex. 198th Jud. Dist. Ct., *jmt. entered* Jan. 12, 2000). His convictions were affirmed. *Boone v. State*, No. 04-01-83-CR (Tex. App.– San Antonio Nov. 21, 2001, *pet. ref'd*). Petitioner's § 2254 petition contends: the trial court erred by imposing his sentences concurrently; allowing State judges to increase punishment handed down by juries is unconstitutional; and Texas Code of Criminal Procedure art. 11.07, § 4 limiting subsequent writ applications is unconstitutional and discriminates against pro se litigants. This Court's records show petitioner filed a previous § 2254 petition challenging these convictions that was dismissed with prejudice by Judge Xavier Rodriguez in 2004 as barred by limitations in *Boone v. Dretke*, No. SA-04-CA-855-XR (W. D. Tex., Nov. 4, 2004).

Title 28 U.S.C. § 2244(a)(3)(A) states a petitioner that has had a previous habeas corpus petition denied on the merits may not file a second or successive § 2254 petition without the authorization of the Court of Appeals. This Court is jurisdictionally barred from addressing a successive § 2254 petition until the court of appeals grants authorization to file such a petition.

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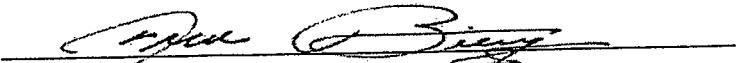
Appx. A- (4)

Crone v. Cockrell, 324 F.3d 833, 836-37 (5th Cir.), *cert. denied*, 540 U.S. 910 (2003). Petitioner failed to present an order to this Court from the Fifth Circuit Court of Appeals authorizing the filing of this successive petition, and therefore this Court has no jurisdiction to proceed with this case. For the reasons explained by Judge Rodriguez in his previous order in *Boone v. Dretke*, No. SA-04-CA-855-XR, the petition is also barred by the one-year statute of limitations of 28 U.S.C. § 2244(d)(1). Furthermore, petitioner's claim that Texas Code of Criminal Procedure art. 11.07, § 4 is unconstitutional is without merit because "infirmities in state habeas proceedings do not constitute grounds for relief in federal court." *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995).

Accordingly, Petitioner Boone's § 2254 Petition is **DISMISSED WITHOUT PREJUDICE** pursuant to § 2244(a)(3)(A) as successive and for failure to obtain authorization from the Court of Appeals to file a successive petition, and in the alternative, is **DISMISSED WITH PREJUDICE** as barred by limitations pursuant to § 2244(d)(1). All other motions are **DENIED** as moot. Petitioner failed to make "a substantial showing of the denial of a federal right" or a substantial showing this Court's procedural rulings are incorrect as required by FED. R. APP. P. 22, *see Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), and therefore this Court **DENIES** petitioner a certificate of appealability. *See* Rule 11(a) of the Rules Governing § 2254 Proceedings.

It is so ORDERED.

SIGNED this 20th day of November, 2014.


FRED BIERY
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

MICHAEL BOONE, TDCJ # 915679,

§

Petitioner,

§

v.

Civil Action

No. SA-14-CA-1009-FB

WILLIAM STEPHENS,

§

Texas Department of Criminal Justice
Institutional Division Director,

§
§
§

Respondent.

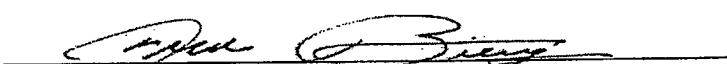
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JUDGMENT

Pursuant to this Court's Dismissal Order of even date herewith, Petitioner Michael Boone's 28 U.S.C. § 2254 Habeas Corpus Petition is **DISMISSED WITHOUT PREJUDICE** pursuant to 28 U.S.C. § 2244(a)(3)(A) as successive and for failure to obtain authorization from the Court of Appeals to file a successive petition, and in the alternative, is **DISMISSED WITH PREJUDICE** as barred by limitations pursuant to 28 U.S.C. § 2244(d)(1). Motions pending, if any, are also **DISMISSED**, a certificate of appealability is **DENIED**, and this case is now **CLOSED**.

It is so ORDERED.

SIGNED this 20th day of November, 2014.


FRED BIERY
CHIEF UNITED STATES DISTRICT JUDGE

(22)

Appx. A-(4)

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