IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50914

BRUCE RANDOL MERRYMAN,

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 Western District of Texas

O R D E R:

Bruce Randol Merryman, Texas prisoner # 1730381, was convicted by a jury of three counts of misapplication of fiduciary property and three counts of theft by deception. He requests a certificate of appealability (COA) to appeal the district court's dismissal, as time barred, of his 28 U.S.C. § 2254 petition challenging his convictions. Merryman's request for leave to supplement to his COA motion is GRANTED.

Merryman does not challenge the district court's determinations that (1) his § 2254 petition was filed beyond the expiration of the one-year limitations period, and (2) he was not entitled to equitable tolling. He has therefore waived these issues. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

Appendix- A

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). The movant satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or 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). Where, as here, the district court has denied relief on a procedural ground, the movant must show 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). When this court has "any doubt about issuing a COA," a COA should be granted. *Whitehead v. Johnson*, 157 F.3d 384, 386 (5th Cir. 1998).

Pointing to documentary evidence that was not presented at his trial, as well as to medical records related to his hospitalization during trial, Merryman argues that he has established a gateway claim of actual innocence, such that he may raise § 2254 claims despite expiration of the limitations period. *See McQuiggin v. Perkins*, 569 U.S. 383, 386-87 (2013). He additionally contends that the district court should have conducted an evidentiary hearing to review the new evidence. Because he has failed to make the requisite showing, Merryman's request for a COA is DENIED as to these issues. *See Slack*, 529 U.S. at 484.

Merryman also asserts that, in view of the Texas Court of Criminal Appeals' decision in *Berry v. State*, 424 S.W.3d 579 (Tex. Crim. App. 2014), which postdated the conclusion of his direct appeal, he has established a gateway claim of actual innocence as to the three convictions of misapplication of fiduciary property. He contends that *Berry* represents a change in state law,

and that, under *Berry*, he did not hold property as a fiduciary. In view of *Berry*, Merryman has shown that reasonable jurists could debate whether the district court erred in determining that he had not established a gateway claim of actual innocence on the misapplication-of-fiduciary-property convictions. *See Slack*, 529 U.S. at 484. Further, Merryman's § 2254 petition asserts facially valid constitutional claims, including claims of ineffective assistance of trial counsel and insufficient evidence. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004).

Accordingly, a COA is GRANTED on the issue whether, in view of *Berry*, the district court erred in determining that Merryman had not established a gateway claim of actual innocence.

Don R. Willett

DON R. WILLETT
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BRUCE RANDOL MERRYMAN, **TDCJ No. 1730381,**	§	
Petitioner,	§	
v.	§	**Civil No. SA-17-CA-311-DAE**
LORIE DAVIS, Director, **Texas Department of Criminal Justice,** **Correctional Institutions Division,**	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Petitioner Bruce Randol Merryman's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Docket Entry "DE" 1), Respondent's Answer (DE 12), and Petitioner's Reply (DE 15) thereto. Petitioner challenges the constitutionality of his underlying conviction for three counts of theft and three counts of misapplication of fiduciary property, arguing (1) he is actually innocent of all six counts; (2) he was denied the right to testify at trial; and (3) he received ineffective assistance of counsel during his trial. In her answer, Respondent Davis contends Merryman's petition should be dismissed with prejudice as time-barred. For the reasons set forth below, Petitioner's federal habeas corpus petition is indeed untimely and is dismissed with prejudice as barred by the one-year statute of limitations embodied in 28 U.S.C. § 2244(d)(1). Petitioner is also denied a certificate of appealability.

Background

In June 2011, Petitioner was convicted of three counts of theft and three counts of misapplication of fiduciary property. *State v. Merryman*, No. 2011-CR-0310 (175th Dist. Ct., Bexar Cnty., Tex. June 24, 2011). He was given a sixteen-year sentence for counts one and two,

Appendix-B

a ten-year sentence for count three, and a two-year sentence for counts four through six, all to run concurrently. *Id.* Petitioner's conviction and sentences were affirmed on direct appeal, and the Texas Court of Criminal Appeals refused his petition for discretionary review on April 24, 2013. *Merryman v. State*, 391 S.W.3d 261 (Tex. App.—San Antonio, Nov. 30, 2012, pet. ref'd); *Merryman v. State*, No. PD-0005-13 (Tex. Crim. App.).

Petitioner waited until August 20, 2014, to file his first state habeas corpus application challenging the constitutionality of his state court conviction and sentence. DE 14-11 at 23; *Ex parte Merryman*, No. 82,440-01 (Tex. Crim. App.). On December 10, 2014, the Texas Court of Criminal Appeals denied the petition without written order on findings of the trial court without a hearing. DE 14-8. Six months later on June 15, 2015, Petitioner filed a second state habeas corpus application that was eventually dismissed as successive on March 22, 2017. DE 14-19 at 20; DE 14-13; *Ex parte Merryman*, No. 82,440-02 (Tex. Crim. App.). The instant federal habeas petition was then placed in the prison mail system on April 5, 2017. DE 1 at 10.

Analysis

Respondent contends Merryman's federal petition is barred by the one-year limitation period of 28 U.S.C. § 2244(d). Under the AEDPA, a state prisoner has one year to file a federal petition for habeas corpus, starting, in this case, from "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); *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013). Petitioner's conviction became final July 23, 2013, ninety days after the Texas Court of Criminal Appeals refused his PDR and when the time for filing a petition for writ of certiorari to the United States Supreme Court expired. *See* Sup. Ct. R. 13.1; *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) ("§ 2244(d)(1)(A) . . . takes into account the time for filing a certiorari petition in determining

the finality of a conviction on direct review"). As a result, the limitations period under § 2244(d) for filing his federal habeas petition expired a year later on July 23, 2014, unless it is subject to either statutory or equitable tolling.

A. **Statutory Tolling**

Petitioner does not satisfy any of the statutory tolling provisions found under § 2244(d)(1). There has been no showing of an impediment created by the state government that violated the Constitution or federal law and prevented petitioner from filing a timely petition. 28 U.S.C. § 2244(d)(1)(B). There has also been no showing of a newly recognized constitutional right upon which the petition is based, and there is no indication that the claims could not have been discovered earlier through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(C)-(D).

Furthermore, although § 2244(d)(2) provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection," it does not toll the limitations period in this case either. As discussed previously, Petitioner's first state habeas application was not filed until August 20, 2014, well after the limitations period expired for challenging his underlying conviction and sentence. Because Petitioner filed both of his state habeas petitions after the time for filing a petition under § 2244(d)(1) had lapsed, his state habeas proceedings had no tolling effect on the limitations period in this case. *See* 28 U.S.C. § 2244(d)(2); *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Consequently, Petitioner's § 2254 petition, which was filed on April 5, 2017—well over two-and-a-half years after the limitations period expired—is untimely.

B. Equitable Tolling

Petitioner has not persuaded this Court to equitably toll the limitations period in this case. The Supreme Court has made clear that a federal habeas corpus petitioner may avail himself of the doctrine of equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013); *Holland v. Florida*, 560 U.S. 631, 649 (2010). But equitable tolling is only available in cases presenting "rare and exceptional circumstances," *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002), and is "not intended for those who sleep on their rights." *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012).

Here, Petitioner provides a litany of arguments as to why the untimeliness of his petition should be excused, including: (1) he suffers from dyslexia and a learning disability; (2) he repeatedly sent his state habeas petition to the wrong address because he did not understand the rules; (3) he is not an attorney; and (4) he had trouble accumulating records because of his imprisonment and limited financial resources. However, Petitioner's alleged dyslexia and learning disability are not "rare and exceptional" circumstances warranting equitable tolling. *See Barrow v. New Orleans S.S. Ass'n,* 932 F.2d 473, 478 (5th Cir. 1991) (holding petitioner's unfamiliarity with the legal process does not merit equitable tolling, regardless of whether "that ignorance is due to illiteracy or another reason."). Similarly, Petitioner's ignorance of the law, lack of legal training or representation, and unfamiliarity with the legal process do not rise to the level of a rare or exceptional circumstance which would warrant equitable tolling of the limitations period. *U.S. v. Petty*, 530 F.3d 361, 365-66 (5th Cir. 2008); *see also Sutton v. Cain*, 722 F.3d 312, 316-17 (5th Cir. 2013) (a garden variety claim of excusable neglect does not warrant equitable tolling). Because Petitioner failed to assert any specific facts showing that he

was prevented, despite the exercise of due diligence on his part, from timely filing his federal habeas corpus petition in this Court, his petition is untimely and barred by § 2244(d)(1).

C. **Actual Innocence**

In his § 2254 petition and again in his response (DE 5) to this Court's Order to Show Cause (DE 4), Petitioner argued his untimeliness should be excused because he has "newly discovered" evidence establishing his innocence. In *McQuiggin v. Perkins,* 133 S. Ct. 1924 (2013), the Supreme Court held that a prisoner filing a first-time federal habeas petition could overcome the one-year statute of limitations in § 2244(d)(1) upon a showing of "actual innocence" under the standard in *Schlup v. Delo,* 513 U.S. 298, 329 (1995). But "tenable actual-innocence gateway pleas are rare," and, under *Schlup*'s demanding standard, the gateway should open only when a petitioner presents new "evidence of innocence 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." *McQuiggin*, 133 S. Ct. at 1928, 1936 (*quoting Schlup,* 513 U.S. at 316). In other words, Petitioner is required to produce "*new* reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence"—sufficient to persuade the district court that "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 1928 (emphasis added).

Petitioner provides a bundle of business records—accounting statements, bank records, contracts, photographs, and emails—to support his actual innocence assertion. All of the records provided by Petitioner, however, concern Petitioner's own business dealings and were thus presumably known to him (and available for use) at the time of trial. Despite Petitioner's belief to the contrary, the fact that some of the records were not presented at trial does not make the records "newly discovered" within the meaning of *Schlup.* Consequently, Petitioner has not

presented a "tenable actual-innocence gateway plea" that would overcome the limitations period of § 2244(d)(1). *McQuiggin*, 133 S. Ct. at 1928.

Conclusion

Based on the foregoing reasons, Petitioner's § 2254 petition (DE 1) is barred from federal habeas corpus relief by the statute of limitations set forth in 28 U.S.C. § 2244(d).

Accordingly, **IT IS HEREBY ORDERED** that:

1. Petitioner Bruce Randol Merryman's § 2254 petition (DE 1) is **DISMISSED WITH PREJUDICE** as time-barred;

2. Petitioner failed to make "a substantial showing of the denial of a federal right" and cannot make a substantial showing that this Court's procedural rulings are incorrect as required by Fed. R. App. P. 22 for a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, this Court **DENIES** petitioner a certificate of appealability. *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; and

3. All other remaining motions, if any, are **DENIED**, and this case is now **CLOSED.**

It is so **ORDERED.**

SIGNED this the 28 day of September, 2017.

DAVID A. EZRA
SENIOR U.S. DISTRICT JUDGE