IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10305
USDC No. 4:16-CV-664

A True Copy
Certified order issued Dec 08, 2017
Clerk, U.S. Court of Appeals, Fifth Circuit

MICHAEL COLBAUGH,

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 Northern District of Texas

O R D E R:

In 1994, Michael Colbaugh, Texas prisoner # 638832, entered into a plea bargain in which he agreed to plead guilty to murder, as a lesser included offense of capital murder, and the State agreed to recommend a life sentence with a deadly weapon finding. The trial court accepted the plea bargain and entered judgment accordingly.

Colbaugh has filed motions in this court for leave to proceed in forma pauperis (IFP) and for a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2254 application as time barred. He argues that the procedural dismissal is debatable because (1) the evidence admitted at two of his codefendants' trials demonstrates that he is actually

innocent of murder; (2) he should benefit from an equitable exception to the limitations bar, in light of *Martinez v. Ryan*, 566 U.S. 1 (2012); and (3) the limitations period should be equitably tolled because his conviction was based on a fraud upon the court.

This court will issue a COA only if a § 2254 applicant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Colbaugh has not met this standard, as he has not demonstrated "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*, 529 U.S. at 484. Accordingly, Colbaugh's motion for a COA is DENIED. His motion seeking leave to appeal IFP is also DENIED.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL COLBAUGH,	§	
	§	
Petitioner,	§	
	§	
V.	§	No. 4:16-CV-664-A
	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent.	§	

OPINION AND ORDER

Before the Court is the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by petitioner, Michael Colbaugh, a state prisoner, against Lorie Davis, director of the Texas Department of Criminal Justice, Correctional Institutions Division, Respondent. After having considered the pleadings and relief sought by Petitioner, the Court has concluded that Respondent's motion to dismiss should be granted and the petition dismissed as time-barred.

I. FACTUAL AND PROCEDURAL HISTORY

In November 1992 Petitioner was indicted in Tarrant County, Texas, Case No. 0492754A, for the capital murder of Roger Rushing in the course of committing and attempting to commit robbery and

kidnapping. (01SHR[1] at 24.) On July 29, 1994, pursuant to a plea agreement, Petitioner pleaded guilty to the lesser-included offense of murder with a deadly weapon. (*Id.* at 26-32.) On November 3, 1994, the trial court sentenced Petitioner to life imprisonment. (*Id.* at 11-19.) As part of the plea agreement, Petitioner expressly waived his right of appeal, and he did not pursue an appeal. (*Id.* at 14.) Thus, the judgment of conviction became final thirty-two days later on December 5, 1994.[2] TEX. R. APP. P. 26.2(a)(1). Petitioner sought state habeas relief from his conviction by filing two state habeas applications. The first, filed on December 14, 1998, was denied by the Texas Court of Criminal Appeals on January 27, 1999, without written order.[3] (*Id.* at cover & 3.) The second, filed on July 17, 2015, was dismissed by the Texas Court of Criminal Appeals as a successive petition under Texas Code of Criminal Procedure art. 11.07, § 4(a)-(c). (SH02 at 2 & "Action Taken.") This federal petition challenging

[1]"SH01" and "SH02" refer to the state court records for petitioner's state habeas actions in WR-40,052-01 and WR-40,052-02, respectively.

[2]December 3, 1994, was a Saturday.

[3]Under the prison mailbox rule, a prisoner's state habeas application is deemed filed when placed in the prison mailing system. *Richards v. Thaler*, 710 F.3d 573, 578-79 (5th Cir. 2013). Petitioner's state habeas applications however do not provide the dates they were placed in the prison mailing system. Thus, the prison mailbox rule is not applied to his state habeas applications.

his conviction was filed on February 8, 2016.[4] (Pet. at 13.[5])

This case involves the robbery, kidnapping, and murder of Roger Dale Rushing Jr. by Petitioner and three accomplices, Johnny Snodgrass, Jack Templer, and Jeffrey Offutt. In Snodgrass's appeal, the Second District Court of Appeals of Texas summarized the facts as follows:

> On the night of September 12, 1992, Snodgrass and three friends . . . were riding around in Colbaugh's car. The four young men had earlier purchased and consumed most of two cases of beer. They decided to drive to Dallas to the Deep Ellum area. While traveling east on Interstate 30, they noticed Roger Dale Rushing, Jr. riding a Kawasaki Ninja motorcycle as Rushing passed Colbaugh's car. Offutt, who thought he was dying of self-diagnosed throat cancer, commented that he "would like to have one of those before I die." Colbaugh asked if Offutt wanted to ride it, Offutt replied he did, and the group began to follow Rushing through Arlington.
>
> After approximately ten minutes, Rushing pulled up in front of a house in Arlington. As Rushing parked his motorcycle, Colbaugh drove the car up to the curb across from Rushing's home. Snodgrass called to Rushing in a feigned attempt to ask for directions. When Rushing approached the car, Snodgrass pointed a .45 caliber automatic pistol at Rushing and told Rushing to give his motorcycle keys and helmet to Offutt. After Rushing gave the keys and helmet to Offutt, Snodgrass

[4]Similarly, under the prison mailbox rule, a federal habeas petition filed by a prisoner is deemed filed when the petition is placed in the prison mail system for mailing. *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998).

[5]Petitioner inserts unpaginated pages into his petition and attaches his unpaginated memorandum to the petition. Therefore, the pagination in the ECF header is used.

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ordered Rushing to get into the backseat of the car. Offutt started the motorcycle and backed out of the driveway. While Rushing was in the backseat of the car, Snodgrass kept the pistol pointed at Rushing, and Templer additionally pointed a sawed-off 12-gauge shotgun at Rushing. Snodgrass told Rushing that Offutt was going to ride the motorcycle for a little while and that they would eventually let Rushing go.

The group drove around with Rushing in the car. Other than pointing weapons at him, the group was friendly to Rushing, asking questions such as his name, where he was from, what kind of music he liked, and whether he smoked. They asked Rushing how much gas the motorcycle had, and Rushing said it probably needed some. They signaled to Offutt and pulled off at a gas station.

After buying some gas, the group, followed by Offutt on the motorcycle, drove to an isolated area. They stopped at a barricade that blocked the road and everyone got out of the car. Snodgrass told Rushing that they were going to tie him up and that a road construction crew would find him in the morning. Templer told Rushing to take off his cowboy belt buckle, jacket, and boots. Colbaugh got some duct tape out [of] his car; and Colbaugh, Snodgrass, and Templer then walked Rushing about 150 yards further down the road past the barricade. At this time, Snodgrass still had the .45 pistol and Templer still had the 12-gauge shotgun. Offutt parked the motorcycle, remained at the car, and drank more beer.

Snodgrass instructed Colbaugh to tape Rushing's hands together, and Colbaugh decided to also tape Rushing's feet so Rushing could not run away or kick him. Snodgrass told Rushing to stand by the side of the road. Colbaugh then left Rushing with Snodgrass and Templer and began walking back toward the car. Colbaugh and Offutt both testified at trial that they heard several shots, beginning first from the .45 and then from the shotgun. Rushing was shot five times with the pistol -- once in the head, three times in the chest,

and once in the thigh -- and three times with the shotgun -- Once in the neck, once in the chest, and once in the arm. Colbaugh, Snodgrass, and Templer fled the scene in the car; Offutt fled the scene on the motorcycle. A local resident found Rushing's body the next morning.

After fleeing the scene, the group initially went to Colbaugh's house and rode the motorcycle up and down the street. Concerned about the noise waking Colbaugh's stepfather, the group then decided to go to Snodgrass's house. There, the group continued to ride the motorcycle up and down the street. Later that morning, the group again rode the motorcycle up and down the street, and Offutt wrecked the motorcycle and injured himself. The motorcycle was secreted behind the house, and Offutt later took it and moved to Boyd, Texas. Colbaugh went to live near Stephenville, Texas. Authorities arrested Offutt and Colbaugh sometime in late October 1992, and Snodgrass, after learning from Colbaugh's stepsister that the police were looking for him, turned himself in to police.

(Pet'r's Exs., Op. 12, ECF No. 3-5.)

II. ISSUES

Petitioner raises the following claims for relief:

(1) New evidence shows that he is actually innocent;

(2) The state withheld exculpatory evidence, thereby rendering his guilty plea involuntary and unknowing;

(3) He received ineffective assistance of trial counsel, thereby rendering his guilty plea involuntary; and

(4) The state perpetrated fraud on the trial court by concealing facts.

(Pet. at 6 & 8.)

III. STATUTE OF LIMITATIONS

Respondent believes the petition is time-barred. (Resp't's Answer at 4-13.) Title 28 U.S.C. § 2244(d) imposes a one-year statute of limitations for filing a petition for federal habeas corpus relief. 28 U.S.C. § 2244(d). Section 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The 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.

Id. § 2244(d)(1)-(2).

A petitioner attacking a judgment of conviction which became final before the AEDPA's effective date has one year from the effective date of the Act, or until April 24, 1997, to file a federal habeas corpus action. *Flanagan v. Johnson*, 154 F.3d 196, 200 (5th Cir. 1998); *United States v. Flores*, 135 F.3d 1000, 1006 (5th Cir. 1998).

With limited exceptions not applicable here, the limitations period begins to run from the date on which the challenged "judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" under subsection (A). In this case, the judgment of conviction became final on December 5, 1994, before the effective date of the AEDPA. Accordingly, Petitioner had until April 24, 1997, within which to file a timely federal habeas petition, absent any applicable tolling.

Petitioner's state habeas applications filed after limitations had expired did not operate to toll the limitations period under the statutory tolling provision in § 2244(d)(2). *Hutson v. Quarterman*, 508 F.3d 236, 240 (5th Cir. 2010); *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Nor has Petitioner

demonstrated that he is entitled to tolling as a matter of equity.

Equitable tolling of the statute of limitations is permitted only in rare and exceptional circumstances when an extraordinary factor beyond a petitioner's control prevents him from filing in a timely manner or he can make a convincing showing that he is actually innocent of the crime for which he was convicted. *McQuiggin v. Perkins*, — U.S. —, 133 S. Ct. 1924, 1928 (2013); *Holland v. Florida*, 560 U.S. 631 , 649 (2010). "'To be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial" and affirmatively demonstrate innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). New evidence may consist of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" and must be sufficient to persuade the district court that "no juror, acting reasonably, would have voted to find [the petitioner] guilty beyond a reasonable doubt." *McQuiggin*, 133 S. Ct. at 1928 (quoting *Schlup*, 513 U.S. at 329).

Although actual innocence, if proved, can overcome the statute of limitations, Petitioner waived his claims by entering a voluntary and knowing guilty plea to the lesser-included offense

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of murder with a deadly weapon. *McQuiggin*, 133 S. Ct. at 1928. *See also United States v. Vanchaik-Molinar*, 195 Fed. App'x 262, 2006 WL 2474048, at *1 (5th Cir. 2006) ("A voluntary guilty plea waives all non-jurisdictional defects that occurred prior to the plea and precludes consideration of a claim challenging the sufficiency of the evidence."). Even if *McQuiggin* applies in the context of a guilty plea, Petitioner has not made a credible showing that he is actually innocent of the crime in light of "new evidence." Petitioner contends that he did not shoot Rushing; that he did not know Rushing would be shot; that he heard Snodgrass tell Rushing that he would let him go; that he had walked away from Snodgrass and Templer and then heard gunshots; and that he had seen Snodgrass and Templer shooting Rushing after he had walked away. (Pet. 6-7, ECF No. 3.) He asserts that new evidence in the form of witness statements and testimony given in Templer's and Snodgrass's trials in 1994 and 1996, after he had entered his guilty plea, confirm that Rushing was shot to death by Snodgrass and Templer and that Petitioner had not caused Rushing's death by shooting him. (*Id.*) Specifically, he argues (all spelling and/or grammatical errors are in the original) --

> Applicant's judgement for Murder . . . was had on 7/29/1994, before the aforesaid trial evidence was recorded as part of the public record and thereafter

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> became new evidence available to Applicant as documents in the public record. Applicant did not possess at the time of his plea hearing the documents that have now become sworn, documentary proof of facts that affirmatively show: Applicant did not in fact cause Roger Rushing's death by shooting him, but in fact show applicant witnesses Johnny Snodgrass & Jackie Templer shoot Rushing after Applicant left the trio . . . and started walking away from them towards Applicant's car, without the knowledge that R. Rushing would be shot.

. . .

> To be guilty of intentionally causing the death of an individual, Roger Rushing, by shooting him with a firearm, Applicant must have committed the conduct that resulted in Rushing's death, by the means alleged, beyond a reasonable doubt. Without committing the shooting himself it is clear that applicant is actually innocent of the Murder for which he is convicted because he did not in fact commit the essential elements of the Murder he plead guilty to. The new, factual evidence shows Applicant walked away before Rushing was shot, Applicant did not shoot Rushing, as Applicant did not have a weapon, & someone else shot Rushing.

(Pet'r's Mem. 14 & 16, ECF No. 3 (emphasis in original) (citations omitted).)

This information, however, is not "new evidence" that "factually exonerates" Petitioner. (Pet'r's Mem. 15, ECF No. 3.) Petitioner was well aware of the nature and extent of his participation in the crime at the time he entered his guilty plea, and, under Texas's law of parties, he could have been convicted of capital murder based upon his participation even though he was not a triggerman. *See Fuller v. Dretke*, 161 Fed. App'x 413, 2006 WL

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42034, at *8 (Jan. 9, 2006); *Johnson v. State*, 853 S.W.2d 527, 534 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 852 (1993) (providing law of parties is applicable to capital murder). The conduct of Petitioner's accomplices is attributable to him. Petitioner's so-called "new evidence" is not evidence of his innocence nor sufficient to result in a miscarriage of justice.

Petitioner also argues that his "procedural default" should be excused under the Supreme Court decisions in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). However, this line of cases addresses excusing a procedural default of a claim and does not apply to the federal statute of limitations or the tolling of that period. *See Hackney v. Stephens*, No. 4:14-CV-074-O, 2014 WL 4547816, at *2 (N.D. Tex. Sep. 15, 2014) (citing cases).

The primary issue here is the statute of limitations, and Petitioner must show that he pursued his rights with "reasonable diligence" but extraordinary circumstances prevented him from filing a petition within the time allowed by the statute. *Holland*, 560 U.S. 631, 649-50 (2010); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Petitioner asserts that he "did not come to possess the [witness statements or] specific trial testimony he now cites as evidence of innocence until well after Dec. 7, 1998." (Pet'r's

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Resp. 8, ECF No. 18.) However, clearly, Petitioner did not thereafter "pursue the process with diligence and alacrity." *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir.), *reh'g granted on other grounds*, 223 F.3d 797 (5th Cir. 2000). Nor do Petitioner's pro se status and an inadequate prison law library entitle him to equitable tolling. *Felder v. Johnson*, 204 F.3d 168, 171-73 (5th Cir. 2000); *Scott v. Johnson*, 227 F.3d 260, 263 n.3 (5th Cir. 2000). Finally, Petitioner's extreme delay further mitigates against equitable tolling.

In summary, there is no evidence whatsoever in the record that Petitioner was prevented in some extraordinary way from asserting his rights in state or federal court, and he presents no new evidence to meet the actual-innocence exception. Therefore. Petitioner's federal petition was due on or before April 24, 1997, and his petition filed on February 8, 2016, is untimely.

For the reasons discussed herein, it is ORDERED that Respondent's motion to dismiss be, and is hereby, granted and that Petitioner's petition for a writ of habeas corpus pursuant to 28

U.S.C. § 2254 is hereby dismissed as time-barred. A certificate of appealability is DENIED.

SIGNED February 10, 2017.

JOHN MCBRYDE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL COLBAUGH,	§	
	§	
Petitioner,	§	
	§	
V.	§	No. 4:16-CV-664-A
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal,	§	
Justice, Correctional	§	
Institutions Division,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

In accordance with the opinion signed by the court on even date herewith,

The court ORDERS, ADJUDGES, and DECREES that the petitions pursuant to 28 U.S.C. § 2254 filed by petitioner, Michael Colbaugh, in the above-captioned actions be, and are hereby, dismissed as time-barred.

SIGNED February 10, 2017.

JOHN MCBRYDE
UNITED STATES DISTRICT JUDGE

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