

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-11386

JOE CLOPTON,

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:

Joe Clopton, Texas prisoner # 1722246, moves for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 application, in which he challenged his 2011 conviction for aggravated sexual assault of a child younger than 14 years of age, as barred by the one-year limitations period in 28 U.S.C. § 2244(d)(1). However, Clopton does not address whether the district court's timeliness determination was correct or otherwise challenge that determination.

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). Because the district court denied him federal habeas relief based on procedural grounds, Clopton must show "that jurists of reason would find it debatable

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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).

He has not made the required showing. *See id.* Accordingly, his motion for a COA is DENIED.

/s/ Leslie H. Southwick

LESLIE H. SOUTHWICK
UNITED STATES CIRCUIT JUDGE

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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

Before SOUTHWICK, HAYNES, and HO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the appellant's motion for leave to file out of time
the motion for reconsideration is GRANTED.

A member of this panel previously denied appellant's motion for a
certificate of appealability. The panel has considered appellant's motion for
reconsideration.

IT IS FURTHER ORDERED that the motion is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOE CLOPTON,)
Petitioner,)
)
v.) No. 3:16-CV-1407-B
)
LORIE DAVIS, Director, TDCJ-CID,)
Respondent.)

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE, AND
DENYING CERTIFICATE OF APPEALABILITY

The United States Magistrate Judge made findings, conclusions and a recommendation in this case. Petitioner filed objections, and the District Court has made a *de novo* review of those portions of the proposed findings and recommendation to which objection was made. The objections are overruled, and the Court ACCEPTS the Findings, Conclusions and Recommendation of the United States Magistrate Judge.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court DENIES a certificate of appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions and Recommendation filed in this case in support of its finding that the petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S.

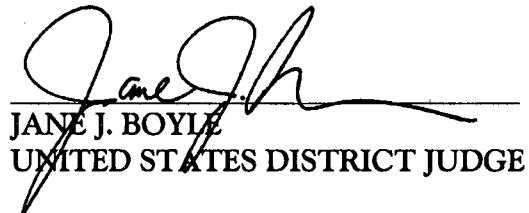
473, 484 (2000).¹

In the event, the petitioner will file a notice of appeal, the court notes that

(X) the petitioner will proceed *in forma pauperis* on appeal.

() the petitioner will need to pay the \$505.00 appellate filing fee or submit a motion to proceed *in forma pauperis*.

SO ORDERED this 1st day of November, 2017.



JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

¹ Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOE CLOPTON,
Petitioner,

v.

LORIE DAVIS, Director, TDCJ-CID,
Respondent.

) No. 3:16-CV-1407-B
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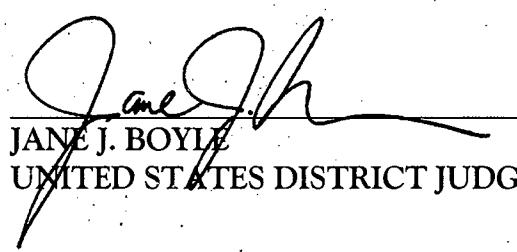
JUDGMENT

The Court has entered its Order Accepting the Findings, Conclusions and Recommendation of the United States Magistrate Judge in this case.

It is therefore ORDERED, ADJUDGED and DECREED that the petition is dismissed with prejudice as barred by the one-year limitation period pursuant to 28 U.S.C. § 2244(d).

The Clerk shall transmit a true copy of this Judgment, together with a true copy of the Order accepting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge, to the parties.

SIGNED this 1st day of November, 2017.


JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

EXHIBIT

A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS SEP 24 2017
DALLAS DIVISION

JOE CLOPTON,)
Petitioner,)
)
v.)
)
LORIE DAVIS, Director, TDCJ-CID,)
Respondent.)
)
No. 3:16-CV-1407-B

**FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

This case has been referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference from the district court. The Findings, Conclusions and Recommendation of the Magistrate Judge are as follows:

I. Parties

Petitioner is an inmate in the Texas Department of Criminal Justice, Criminal Institutions Division (TDCJ-CID). He brings this petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. Respondent Lorie Davis is Director of TDCJ-CID.

II. Background

Petitioner pled *nolo contendere* to aggravated sexual assault of a child and was sentenced to twenty-five years in prison. *State of Texas v. Joe Clopton*, No. F-0862601-Y (Crim. Dist. Ct. No. 4, Dallas County, Tex., June 6, 2011). On October 10, 2012, Petitioner's conviction and sentence were affirmed on direct appeal. *Clopton v. State*, No. 05-11-00762-CR, 2012 WL 4801514 (Tex. App. – Dallas, 2012, no pet.). Petitioner did not file a petition for discretionary review.

On January 13, 2014, Petitioner filed a state habeas petition. *Ex parte Clopton*, No. 82,521-01. On April 1, 2015, the Texas Court of Criminal Appeals denied the petition without written order. On March 7, 2016, Petitioner filed a second state habeas petition. *Ex parte Clopton*, No. 82,521-02. On May 4, 2016, the Texas Court of Criminal Appeals dismissed the petition as subsequent.

On May 18, 2016, Petitioner filed this federal petition for habeas relief. He argues:

- (1) He is actually innocent;
- (2) He received ineffective assistance of counsel; and
- (3) There was no evidence to support the conviction.

On September 28, 2016, Respondent filed her answer arguing, *inter alia*, that the petition is barred by limitations. On May 12, 2017, and July 18, 2017, Petitioner filed affidavits in support of his petition. The Court now finds the petition should be dismissed as time-barred.

III. Discussion

A. Statute of Limitations

Petitioner filed his § 2254 petition after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Therefore, the AEDPA governs the present petition. *See Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 2068, 138 L. Ed. 2d 481 (1997). The AEDPA establishes a one-year statute of limitations for federal habeas proceedings. *See* Antiterrorism and Effective Death Penalty Act, Pub.L. 104-132, 110 Stat. 1214 (1996).

In most cases, the limitations period begins to run when the judgment becomes final after

direct appeal or the time for seeking such review has expired. 28 U.S.C. § 2244(d)(1)(A).¹

On October 10, 2012, the Fifth District Court of Appeals denied Petitioner's appeal. His conviction became final thirty days later, on November 9, 2012. *See Tex. R. App. P. 68.2 (PDR must be filed within 30 days after court of appeals renders judgment or overrules motion for rehearing); see also Roberts v. Cockrell*, 319 F.3d 690, 694-95 (5th Cir. 2003) (state conviction becomes final for limitations purposes when time for seeking further direct review expires, regardless of when mandate issues). Petitioner then had one year, or until November 9, 2013, to file his federal petition.

The filing of a state application for habeas corpus tolls the statute of limitations. *See* 28 U.S.C. § 2244 (d)(2). On January 13, 2014, Petitioner filed his first state habeas petition. This petition was filed after the AEDPA limitations period expired. It therefore did not toll the

¹The statute provides that the limitations 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 direct 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.

28 U.S.C. § 2244(d)(1).

limitations period.

Petitioner was required to file his § 2254 petition by November 9, 2013. He did not file his petition until May 18, 2016. His petition is therefore untimely.

B. Equitable Tolling

The one-year limitation period is subject to equitable tolling in "rare and exceptional cases." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *see also Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (asserting that courts must "examine each case on its facts to determine whether it presents sufficiently 'rare and exceptional circumstances' to justify equitable tolling" (quoting *Davis*, 158 F.3d at 811)). The Fifth Circuit has held that "[e]quitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (quoting *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996)). Petitioner bears the burden of proof to show he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

In this case, Petitioner has made no argument that he was misled by the state or prevented in some extraordinary way from asserting his rights. He has failed to show he is entitled to equitable tolling.

C. Actual Innocence

Petitioner argues he should be excused from the limitations period because he is actually innocent. The Supreme Court has recently held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations." *McQuiggin*

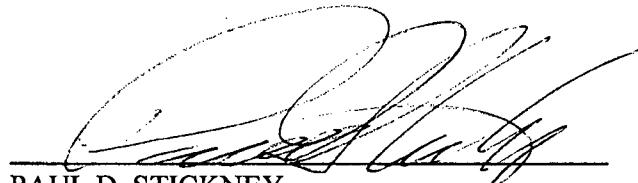
v. Perkins, 133 S.Ct. 1924, 1928 (2013). A petitioner who claims actual innocence, however, “must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Id.* Petitioner has failed to meet this high standard.

Petitioner submits affidavits from his two sons to support his actual innocence claims. These affidavits, however, do not show that it is more likely than not that no reasonable juror would have convicted him in light of the affidavits. In their affidavits, Petitioner’s sons state they each had a sexual contact with the victim, and that Petitioner was not aware of this. The affidavits, however, do not show that Petitioner did not have sexual contact with the victim. Petitioner’s actual innocence claim is insufficient to excuse him from the statute of limitations.

IV. Recommendation

The Court recommends that the petition for a writ of habeas corpus be dismissed with prejudice as barred by the one-year limitation period. *See* 28 U.S.C. §2244(d).

Signed this 23 day of September, 2017.



PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO OBJECT**

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

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