IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-50966

RUBEN S. RAMIREZ,

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

ORDER:

Ruben S. Ramirez, Texas prisoner # 1563838, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition as time barred and leave to proceed in forma pauperis (IFP) on appeal. In his § 2254 petition, Ramirez challenged his conviction for serious bodily injury to a child, arguing that newly discovered evidence, specifically affidavits from his counsel and his wife's counsel, showed that he was coerced into entering a guilty plea when his counsel threatened to withdraw from representation if he did not enter a plea. He argues as follows in his COA application: the 28 U.S.C. § 2244(d)(1) limitations period did not start to run until he discovered the affidavits of counsel; he is entitled to equitable tolling of the limitations period because he could not have discovered the affidavits

earlier as they did not exist until his first state habeas proceeding; and the affidavits prove his actual innocence, which serves as a gateway through which he may raise his § 2254 claims regardless of the limitations period.

A COA will issue if Ramirez makes "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). Because the district court denied relief on procedural grounds, this court will grant a COA only if reasonable jurists would debate whether the district court's procedural ruling is correct and whether Ramirez states a valid claim of a constitutional deprivation. *See Slack*, 529 U.S. at 484. Ramirez has not shown that reasonable jurists would debate the district court's time-bar ruling. *See id.*

Accordingly, a COA is DENIED. Ramirez's motion to proceed IFP on appeal is likewise DENIED.

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RUBEN S. RAMIREZ,	§	
TDCJ No. 1563838,	§	
	§	
Petitioner,	§	
	§	
v.	§	**CIVIL NO. SA-18-CA-0829-XR**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

DISMISSAL ORDER

Before the Court is *pro se* Petitioner Ruben S. Ramirez's petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 (ECF No. 1), as well as his Response to the Court's Order to Show Cause (ECF No. 5). For the reasons set forth below, Petitioner's federal habeas corpus petition is dismissed with prejudice as barred by the one-year statute of limitations embodied in § 2244(d). Petitioner is also denied a certificate of appealability.

Background

In February 2009, Petitioner was convicted of one count of murder and entered an open plea of guilty to one count of serious bodily injury to a child. He was sentenced to life imprisonment for the murder count and received a concurrent ninety-nine year sentence for the injury to a child count. *State v. Ramirez*, No. 11-09-CR (2nd 25th Dist. Ct., Gonzales Cnty., Tex. Feb. 9, 2009). His convictions were affirmed on direct appeal and his petition for discretionary review (PDR) was refused February 9, 2011. *Ramirez v. State*, No. 13-09-00073-CR (Tex. App.—Corpus Christi, Aug. 31, 2010, pet. ref'd); *Ramirez v. State*, No. PD-1426-10 (Tex. Crim. App.). Petitioner then waited until April 5, 2016, to file a state habeas corpus

application which was ultimately denied without written order by the Texas Court of Criminal Appeals on October 12, 2016. *Ex parte Ramirez*, No. 85,103-01 (Tex. Crim. App.). Citing the discovery of "new" evidence, Petitioner filed a second state habeas corpus application on June 16, 2017, which was dismissed by the Texas Court of Criminal Appeals as a subsequent writ on August 9, 2017. *Ex parte Ramirez*, No. 85,103-02 (Tex. Crim. App.).

Petitioner placed the instant federal habeas petition in the prison mail system on August 8, 2018. (ECF No. 1 at 11). In the petition, Petitioner contends that "newly discovered" evidence in the form of attorney affidavits bolsters the allegation he originally made in his first state habeas petition that he was coerced by his attorney into pleading guilty to injury to a child.

Timeliness Analysis

"[D]istrict courts are permitted . . . to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Day v. McDonough*, 547 U.S. 198, 209 (2006). Section 2244(d) provides, in relevant part, that:

> (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.

In this case, Petitioner's conviction became final May 10, 2011, 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; *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 a federal habeas petition challenging his underlying conviction expired a year later on May 10, 2012. Because Petitioner did not file his § 2254 petition until August 8, 2018—over six years after the limitations period expired—his petition is barred by the one-year statute of limitations 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)(i). There has been no showing of an impediment created by the state government that violated the Constitution or federal law which 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).

Similarly, 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, both of Petitioner's state habeas applications were filed well after the limitations period expired for challenging his underlying conviction and sentence. Because Petitioner filed his state habeas petition after the time for filing a federal petition under § 2244(d)(1) has lapsed, it does not toll the one-year limitations period. *See* 28 U.S.C. § 2244(d)(2); *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000).

B. Equitable Tolling

Petitioner also failed to provide this Court with a valid reason 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*, 569 U.S. 383, 391 (2013) (citing *Holland v. Florida*, 560 U.S. 631, 649 (2010)). However, 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).

Petitioner's federal habeas petition does not assert that any extraordinary circumstance prevented him from filing earlier or establish that he has been pursuing his rights diligently. For this reason, Petitioner was given the opportunity to explain why his petition should not be dismissed as untimely (ECF No. 2). In his response, Petitioner does not assert any extraordinary circumstance prevented him from filing earlier and states that he took extra time to perfect his state habeas application because he was not adept at the law. (ECF No. 5 at 2). But a 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 that 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).

Furthermore, Petitioner slept on his right to challenge his conviction in a state habeas application for almost four years, then waited another year to file his federal petition following the dismissal of his second state habeas application. Petitioner admittedly offers "no acceptable excuse" for failing to pursue his rights diligently. Thus, 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 response to this Court's Show Cause Order, Petitioner contends his untimeliness should be excused because of the actual-innocence exception. In *McQuiggin*, 569 U.S. at 386, 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*, 569 U.S. at 386, 401 (*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." *Schlup,* 513 U.S. at 324.

To establish actual innocence, Petitioner cites to "newly discovered evidence" in the form of an affidavit from his co-defendant's attorney, John Nathan Stark, dated August 9, 2016. Petitioner contends that the affidavit is "new" because he did not receive it until after his first state habeas proceedings concluded. The record indicates the affidavit is not new, however, as it was considered by the state habeas trial court when it rejected Petitioner's allegation that he was coerced by his own counsel into pleading guilty. *See Ex parte Ramirez*, No. 85,103-01 (supplemental record containing Findings of Fact and Conclusions of Law). Petitioner also incorrectly believes that the Stark affidavit bolsters his contention that he was coerced into pleading guilty by counsels' threats to withdraw if Petitioner chose otherwise. Quite the opposite, the affidavit states "[n]o threats of any kind were made to [Petitioner's co-defendant] to coerce her into entering a plea of guilty." (ECF No. 1 at 20).

Even if the Stark affidavit did somehow bolster his coercion allegation, Petitioner still has not made a showing of "actual innocence" under the standard set forth in *Schlup*. In other words, he has not demonstrated that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *McQuiggin*, 569 U.S. at 399. Petitioner's argument is simply a reiteration of the arguments he made in both his state and federal petitions concerning his plea of guilty to injury to a child. But these arguments, which were rejected by the state habeas court, do not undermine confidence in the outcome of his trial. Consequently, the untimeliness of Petitioner's federal habeas petition will be not excused under the actual-innocence exception established in *McQuiggin*.

Conclusion

Rule 4 Governing Habeas Corpus Proceedings states a habeas corpus petition may be summarily dismissed "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Based on the foregoing reasons, Petitioner's federal habeas corpus petition does not warrant federal habeas corpus relief.

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

1. Petitioner Ruben S. Ramirez's § 2254 petition (ECF No. 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 4th day of October, 2018.

XAVIER RODRIGUEZ
United States District Judge