IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-50302

JOSE ANTONIO CORTEZ,

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:

Jose Antonio Cortez, Texas prisoner # 650162, seeks a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 petition, challenging his 1993 convictions for aggravated sexual assault of a child and indecency with a child, as time barred, pursuant to 28 U.S.C. § 2244(d). To obtain a COA, he must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court denied relief on procedural grounds, a COA should be granted "when the prisoner shows, at least, that jurists of reason would find it debatable whether the [application] 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).

Appendix A

In his COA motion, Cortez argues that he is actually innocent and that his innocence prevents the application of the statute of limitations bar to his case. He also asserts, for the first time, that the limitations period is unfair and disproportionately affects poor and minority prisoners. This newly raised argument will not be considered. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

Cortez fails to show that reasonable jurists would find the dismissal of his § 2254 petition as untimely debatable. *See* 28 U.S.C. § 2244(d)(1); *Flanagan v. Johnson*, 154 F.3d 196, 200 (5th Cir. 1998); *see also McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). Accordingly, his COA motion is DENIED. *See Slack*, 529 U.S. at 484. His motion for leave to proceed IFP is likewise DENIED.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE ANTONIO CORTEZ,	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil No. SA-18-CA-0923-FB**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are *pro se* petitioner Jose Antonio Cortez's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1), respondent's Answer (ECF No. 7) and petitioner's reply (ECF NO. 10). Petitioner challenges the constitutionality of his 1993 state court convictions for aggravated sexual assault of a child and indecency with a child, arguing that he received ineffective assistance from both his trial counsel and appellate counsel and that he is actually innocent because (a) the jury charge allowed him to be convicted by a less than unanimous verdict for separate offenses, (b) his convictions violate the Double Jeopardy Clause because they punish him multiple times for one act, and (c) the jury charge was unconstitutionally vague. In her Answer, respondent Davis contends petitioner's federal habeas 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.

Appendix B

Background

In February 1993, petitioner was convicted of two counts of aggravated sexual assault of a child, two counts of indecency with a child by sexual contact, and one count of indecency with a child by exposure. As punishment, petitioner was sentenced to forty-five years of imprisonment for each count of aggravated sexual assault and indecency by sexual contact, and to twenty years of imprisonment for the remaining count of indecency by exposure. *State v. Cortez*, Nos. 92CR6828 and 92CR6829 (290th Dist. Ct., Bexar Cnty., Tex. Feb. 16, 1993). His convictions and sentences were affirmed on direct appeal, and the Texas Court of Criminal Appeals (TCCA) refused his petition for discretionary review (PDR) on March 1, 1995. *Cortez v. State*, Nos. 04-93-00128-CR and 04-93-00129-CR (Tex. App.—San Antonio, Oct. 12, 1994, pet. ref'd); *Cortez v. State*, No. PD-1432-94 (Tex. Crim. App.).

Petitioner then waited until October 26, 2016, to file state habeas corpus applications challenging the constitutionality of his state court convictions, which the TCCA eventually denied without written order on February 28, 2018. *Ex parte Cortez*, Nos. 87,766-02, -03 (Tex. Crim. App.) (ECF Nos. 8-20, 8-25, 8-27, and 8-32). The instant federal habeas petition was later filed on September 4, 2018.

Timeliness Analysis

Respondent contends petitioner's federal habeas petition is barred by the one-year limitation period of 28 U.S.C. § 2244(d). Under this statute, 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). In this case, petitioner's conviction became final May 30, 1995, ninety days after the TCCA 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").

However, the one-year limitations period of § 2244(d)(1) did not become effective until April 24, 1996, the day Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* Pub. L. No. 104–132, 110 Stat. 1217. As a result, the limitations period under § 2244(d) for petitioner to file a federal habeas petition challenging his underlying convictions expired a year later on April 24, 1997. *See Flanagan v. Johnson*, 154 F.3d 196, 200 (5th Cir. 1998) (finding such petitioners have one year after the April 24, 1996, effective date of AEDPA in which to file a § 2254 petition for collateral relief). Because petitioner did not file his § 2254 petition until September 4, 2018—over twenty-one 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 28 U.S.C. § 2244(d)(1). 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, petitioner's state habeas applications were not filed until October 2016, well after the limitations period expired for challenging his underlying convictions and sentences in federal court. Because the state habeas petitions were filed after the time for filing a federal petition under § 2244(d)(1) had lapsed, they do not toll the one-year limitations period.[1] *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); *Holland v. Florida*, 560 U.S. 631, 649 (2010). 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).

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[1] Petitioner also filed a petition for mandamus relief with the TCCA. *Ex parte Cortez*, No. 87,766-01 (Tex. Crim. App.) (ECF Nos. 8-18). Similar to petitioner's state habeas petitions, the mandamus petition was filed well after the time for filing a federal petition under § 2244(d)(1) had lapsed. Even if it had been timely filed, the mandamus petition would not toll the limitations under § 2244(d)(2) because it did not seek review of the underlying judgment and sentence. *See Moore v. Cain*, 298 F.3d 361, 367 (5th Cir. 2002) (finding a mandamus application did not toll the limitations period because it was not a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment.").

Petitioner does not contend that an exceptional circumstance warrants equitable tolling. Nor does he argue that he has been diligent in pursuing his rights but some extraordinary circumstance prevented him from filing earlier. Indeed, Petitioner does not appear to make any attempt to establish that equitable tolling should apply in this case, and 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 which would warrant equitable tolling of the limitations period. *United States 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

Finally, petitioner briefly asserts his untimeliness should be excused because of the actual-innocence exception. (ECF No. 10 at 2-3). 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 set forth 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.

Petitioner does not attempt to meet this standard. Instead, petitioner refers to the jury instruction and double jeopardy issues raised in his federal petition and baldly declares his "actual innocence" in order to overcome the untimeliness of his petition. But petitioner's conclusory argument does not constitute "*new* reliable evidence" establishing his innocence. Moreover, petitioner's arguments were already rejected by the state court during petitioner's state habeas proceedings and 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

Based on the foregoing reasons, petitioner's § 2254 petition (ECF No. 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. Federal habeas corpus relief is **DENIED** and petitioner Jose Antonio Cortez's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (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 28th day of February, 2019.

FRED BIERY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE ANTONIO CORTEZ,	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil No. SA-18-CA-0923-FB**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

Before the Court is petitioner Jose Antonio Cortez's Motion for Reconsideration (ECF No. 14). Petitioner's motion is construed as a motion to amend the judgment pursuant to FED. R. CIV. P. 59 because petitioner seeks reconsideration of the denial of his 28 U.S.C. § 2254 Habeas Corpus Petition (ECF No. 12) and the motion was filed within 28 days of the entry of judgment. After careful consideration, the Court has determined that petitioner's motion is without merit.

To start, petitioner's motion either raises new arguments or contends the Court incorrectly adjudicated the arguments raised in his § 2254 petition. As such, the motion must be dismissed as successive under 28 U.S.C. § 2244. *See Gonzalez v. Crosby*, 545 U.S. 524, 530-32 & n. 4 (2005) (holding that a Rule 60(b) motion that raises "new" claims or attacks the resolution of claims previously adjudicated on the merits is the functional equivalent of a successive petition); *Williams v. Thaler*, 602 F.3d 291, 303 (5th Cir. 2010) (applying the *Gonzalez* framework to motions under Rule 59(e)). Petitioner has not obtained leave from the Fifth Circuit Court of Appeals to file a successive habeas petition as dictated by 28 U.S.C § 2244(b)(3)(A). Therefore, this Court lacks jurisdiction to consider his motion. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (§ 2244(b)(3)(A) "acts as a jurisdictional bar to the

Appendix C.

district court's asserting jurisdiction over any successive habeas petition" until the appellate court has granted petitioner permission to file one).

Even assuming the Court had jurisdiction, petitioner's motion relies almost exclusively on arguments that have already been presented to, and considered by, this Court. When evaluating motions to reconsider pursuant to FED. R. CIV. P. 59, courts must be aware that such motions are *not* designed to permit a party to continue to re-litigate the same claims with the same arguments, or even new arguments, once there has been a ruling on the merits of a claim. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 (2008) (Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." (citation omitted)). Because this Court has already thoroughly considered and rejected petitioner's arguments, his motion to reconsider will be denied to the extent it is not a successive petition challenging the Court's merits determination.

Accordingly, **IT IS HEREBY ORDERED** that petitioner's Motion for Reconsideration filed March 25, 2019 (ECF No. 14), is **DISMISSED** without prejudice for want of jurisdiction. Alternatively, the Motion to Reconsider is **DENIED**;

It is further **ORDERED** that a certificate of appealability is **DENIED** for the instant motion, as reasonable jurists could not debate the dismissal or denial of petitioner's motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

It is so ORDERED.

SIGNED this 26th day of March, 2019.

FRED BIERY
UNITED STATES DISTRICT JUDGE