# Appendix A

United States Court of Appeals
For The Fifth Circuit

Order
Denying Motion For COA

Filed October 02, 2019

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

No. 18-11236



BOBBY DREW AUTRY,

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:

Bobby Drew Autry, Texas prisoner # 01701196, was convicted of two counts of sexual assault of a child and was sentenced initially to ten years of deferred adjudication community supervision. Subsequently, Autry's supervision was revoked, he was adjudged guilty, and he was sentenced to life imprisonment. The district court dismissed his 28 U.S.C. § 2254 application as time barred and denied postjudgment motions invoking Federal Rule of Civil Procedure 59(e). Autry filed notices of appeal as to both rulings.

To appeal the denial of § 2254 relief, Autry must be granted a COA. 28 U.S.C. § 2253(c)(2). He must obtain a COA also to appeal the denial of a Federal Rule of Civil Procedure 59(e) motion. *See Williams v. Thaler*, 602 F.3d 291, 304 (5th Cir. 2010). Thus, Autry must make "a substantial showing of the

denial of a constitutional right." § 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).

In his filings in this court, Autry contends that he is actually innocent and that his innocence prevents the application of the statute of limitations bar to his case. He also contends that the application of the Antiterrorism and Effective Death Penalty Act (AEDPA) to his case was error, that the AEDPA violates the Due Process Clause and the Suspension Clause, and that its application resulted in an ex post facto violation. He reurges arguments in support of the merits of the substantive claims he raised in the district court, and he seeks, in a one-sentence request, a hearing.

Autry has not made the required showing for a COA as reasonable jurists would not debate the correctness of the district court's denial of Autry's § 2254 application or the denial of his postjudgment motions. *See Slack*, 529 U.S.at 484; *Williams*, 602 F.3d at 304. His motions to correct a typographical error in his COA motion and to file a supplemental COA motion are GRANTED. Autry's motion for a COA is DENIED, and the motion to file supplemental evidence supporting one of his claims is DENIED.

JAMES C. HO
UNITED STATES CIRCUIT JUDGE

# Appendix B

United States District Court
For The Northern District of Texas
Dallas Division

Order

Denying Petition

Filed September 21, 2018

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| **BOBBY DREW AUTRY,** **Petitioner,** | ) | |
| **v.** | ) | **No. 3:17-cv-2088-N (BT)** |
| **LORIE DAVIS, *Director*, TDCJ-CID,** **Respondent.** | ) | |

**ORDER**

Before the Court is Petitioner's motion to alter or amend the judgment under Fed. R. Civ. P. 59, (ECF No. 42), and motion for leave to file an amended motion to alter or amend the judgment under Fed. R. Civ. P. 59. (ECF No. 43.) For the following reasons, the motions are DENIED.

Petitioner argues the Court should not have dismissed his petition as barred by the statute of limitations because he is actually innocent. As discussed in the magistrate judge's Findings, Conclusions, and Recommendation, a claim of actual innocence may excuse a petitioner's untimely filing of his petition. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). A petitioner who claims actual innocence, however, must submit new evidence not presented at trial and "must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.*

Here, Petitioner argues he is actually innocent of violating his probation because he did not consume alcohol or illegal drugs, and because the probation conditions were unlawful. The record shows that during his revocation proceeding, Petitioner argue he had not violated his

conditions of probation. (ECF No. 13-5 at 57-76.) The State's polygraph examiner, however, testified that Petitioner told him that he had used alcohol in February 2009, and marijuana in September, 2009. (*Id.* at 8-9.) At the revocation hearing, Petitioner admitted that he made these statements to the polygraph examiner, but claimed that he had lied to polygraph examiner and had not in fact used alcohol or marijuana. (*Id.* at 58-67.) The trial court determined that Petitioner had violated his conditions of probation and adjudicated him guilty. Petitioner has submitted no new evidence that he did not use alcohol or marijuana in violation of his probation.

Petitioner also argues that the conditions of probation were unlawful because the conditions were illegally modified and he refused to sign them. The record shows, however, that on April 13, 2004, Petitioner was sentenced to deferred adjudication probation, and the court imposed conditions of probation that required him to abstain from alcohol and illegal drugs. (ECF No. 13-1 at 28-31.) Although Petitioner refused to sign the conditions of probation, the record notes he was provided a copy in the presence of the judge. (*Id.* at 30.) Petitioner has failed to establish that his actual innocence claim renders his petition timely under *McQuiggin*. His motion under Fed. R. Civ. P. 59 is therefore DENIED.

Petitioner also filed a motion for leave to file an amended motion under Fed. R. Civ. P. 59 arguing that the AEDPA does not apply to his case, the conditions of probation were unlawfully modified, the State breached the plea agreement, the trial court lacked subject-matter jurisdiction, he was subjected to false imprisonment, and he received ineffective assistance of counsel. Petitioner's claim that the AEDPA does not apply to his petition is frivolous. *See Lindh v. Murphy*, 521 U.S. 320, 328 (1997) (stating the AEDPA applies to habeas petitions filed after April 24, 1996.) Additionally, as discussed in the magistrate judge's Findings, Conclusions, and Recommendation, Petitioner's claims are barred by the statute of limitations.

Petitioner's motion for leave to amend his Rule 59 motion is DENIED as futile.

IT IS SO ORDERED.

Signed this 21st day of September, 2018.

DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE

# Appendix C

## United States Court of Appeals
## For The Fifth Circuit

## Denial Of
## Petition For Panel Rehearing

Filed November 04, 2019

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

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No. 18-11236

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BOBBY DREW AUTRY,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent – Appellee

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Appeal from the United States District Court
for the Northern District of Texas

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Before SMITH, COSTA and HO, Circuit Judges.

PER CURIAM:

This panel previously denied appellant's motions for a certificate of appealability and to file supplemental evidence supporting one of his claims and granted appellant's motions to correct a typographical error in his certificate of appealability and to file a supplemental certificate of appealability. The panel has considered appellant's motion for reconsideration of the denial of a certificate of appealability. IT IS ORDERED that the motion is DENIED.

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

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| BOBBY DREW AUTRY,<br>Petitioner, | §<br>§<br>§ | |
| v. | § | No. 3:17-CV-2088-N (BT) |
| LORIE DAVIS, *Director*, TDCJ-CID<br>Respondent. | §<br>§ | |

**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 follow:

I.

Petitioner filed this petition for writ of habeas corpus under 28 U.S.C. § 2254. For the following reasons, the Court should DISMISS the petition.

On April 13, 2004, Petitioner pleaded guilty to two cases of sexual assault of a child. *State of Texas v. Bobby Drew Autry*, Nos. F-0325714-U and F-0325713-U (283rd Jud. Dist. Ct., Dallas County, Tex., Apr. 13, 2004). The court sentenced him to ten years deferred adjudication probation. On February 11, 2011, the court revoked Petitioner's probation and sentenced him to life in prison in both cases. On May 29, 2012, the Fifth District Court of Appeals affirmed.

*Autry v. State*, Nos. 05-11-00217-CR and 05-11-00218-CR, 2012 WL 1920900 (Tex. App. – Dallas May 29, 2012, no pet.).

On July 2, 2014, Petitioner filed two state habeas petitions. *Ex parte Autry*, Nos. 81,972 -02 and -03. On October 1, 2014, the Court of Criminal Appeals denied the petitions without written order. On July 27, 2014, Petitioner filed a third state habeas petition. *Ex parte Autry*, No. 81,972-04. On January 13, 2016, the Court of Criminal Appeals denied the petition without written order. On November 6, 2016, Petitioner filed a fourth state habeas petition. *Ex parte Autry*, No. 81,972-08. On January 11, 2017, the Court of Criminal Appeals dismissed the petition as subsequent.

On August 3, 2017, Petitioner filed the instant § 2254 petition. He argues:

1. He is actually innocent;
2. The court breached the plea agreement when it modified the agreement;
3. He was falsely imprisoned; and
4. He received ineffective assistance of counsel during the revocation.

Petitioner also filed a motion for summary judgment, (ECF No. 25), and a motion to rehear his motion for summary judgment, (ECF No. 19), which motions are based on the same grounds as the petition.

II.

**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 (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. *See* 28 U.S.C. § 2244(d)(1)(A).[1]

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[1] The 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).

Petitioner challenges his revocations. On May 29, 2012, the Fifth District Court of Appeals affirmed the revocations. Petitioner did not file a petition for discretionary review. His revocations therefore became final thirty days later on June 28, 2012. *See* Tex. R. App. P. 26.2 (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 June 28, 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 July 2, 2014, Petitioner filed his first two state habeas petitions. These petitions were filed after the AEDPA limitations period expired, they therefore did not toll the limitations period.

Petitioner was required to file his federal habeas petition by June 28, 2013. He did not file his petition until August 3, 2017. His petition is therefore untimely.

**B. Actual Innocence**

Petitioner claims he is actually innocent of the probation violations. The Supreme Court has 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 submit new evidence and "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. Although he argues he did not drink alcohol or take unlawful drugs in violation of his conditions of probation, he raised these arguments during his revocation hearing. He has failed to submit any new evidence to support his claims. (ECF No. 13-5 at 57-76.) Petitioner's actual innocence claim is insufficient to excuse him from the statute of limitations.

**C. 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. Am. 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).

Petitioner has not alleged that he was misled about his habeas remedies or prevented in some extraordinary way from filing his petition. He has failed to show rare and exceptional circumstances justifying equitable tolling in this case.

III.

For the reasons stated, the petition for a writ of habeas corpus should be DISMISSED with prejudice as barred by the one-year limitations period. *See* 28 U.S.C. §2244(d). Further, Petitioner's motion for summary judgment, (ECF No. 25), and motion to rehear motion for summary judgment, (ECF No. 19), should be DENIED.

Signed May 7 2018.

REBECCA RUTHERFORD
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).

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| **BOBBY DREW AUTRY,** **Petitioner,** | ) | |
| **v.** | ) | **No. 3:17-CV-2088-N (BT)** |
| **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

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

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

SO ORDERED this 9th day of August, 2018.

DAVID C. GODBEY
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.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| **BOBBY DREW AUTRY,** | ) | |
| **Petitioner,** | ) | |
| | ) | |
| **v.** | ) | **No. 3:17-CV-2088-N (BT)** |
| | ) | |
| **LORIE DAVIS, Director, TDCJ-CID,** | ) | |
| **Respondent.** | ) | |

**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) , and all pending motions are denied.

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 9th day of August, 2018.

DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE