United States Court of Appeals for the Fifth Circuit

No. 20-40296

A True Copy
Certified order issued Sep 25, 2020
Clerk, U.S. Court of Appeals, Fifth Circuit

WELDON BOYCE BRIDGES,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 9:17-CV-2

ORDER:

Weldon Boyce Bridges, Texas prisoner # 1585306, pleaded guilty to aggravated sexual assault of a child and was sentenced to a 22-year term of imprisonment. He has moved for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 petition, which he filed to challenge his conviction and his sentence. Bridges's motion for leave to file a supplemental COA brief is GRANTED.

To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Where the district court denies

relief on the merits, a movant must show that reasonable jurists "would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Where the district court denies federal habeas relief on procedural grounds, the movant must demonstrate that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and "whether the district court was correct in its procedural ruling." *Id.* A movant satisfies the COA standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Most of Bridges's COA filings are devoted to arguing the merits of his claims regarding his guilty plea conviction, his efforts to obtain DNA testing, and his state habeas petition. In addition to arguing the merits of his claims, Bridges asserts that he was granted an out-of-time appeal and that his actual innocence would have been established if evidence had been received from Valerie Murphy, a registered nurse he describes as the State's witness.

Bridges does not challenge the district court's determination that, as to his claims concerning his guilty plea and events that occurred prior to the plea, the one-year limitations period began to run when his conviction became final and that the limitations period expired before he filed his motion for DNA testing and his state habeas petition. He also does not challenge the district court's determination that he is not entitled to equitable tolling. Bridges has therefore abandoned these issues by failing to brief them in his COA filings. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Bridges has failed to show that reasonable jurists could debate the correctness of the district court's dismissal, as time barred, of his claims concerning the guilty plea and pre-plea events. *See Slack*, 529 U.S. at 484;

see also McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). He has also failed to show that reasonable jurists could disagree with the district court's determination that his claims concerning infirmities in his state habeas and DNA testing proceedings were not cognizable on federal habeas review. *See Miller-El*, 537 U.S. at 327; *Rudd v. Johnson*, 256 F.3d 317, 320 (5th Cir. 2001). Accordingly, his COA motion is DENIED.

GREGG COSTA
United States Circuit Judge

United States District Court
Eastern District of Texas
Lufkin, Division

WELDON Boyce BRIDGES	§	
Petitioner	§	
vs.	§	Civil Case No. 9:17-cv-2
Bobby Lumpkin - Director	§	
Texas Dept. Crim. Justice	§	
Respondent	§	

60(b) Motion

Comes Now Petitioner, pursuant to Federal Rules of Civil Procedure Rule 60(b) Relief From a Judgment, Order, or Proceeding. On Motion and just terms the court may relieve a party or its legal representative from a final judgment, or proceeding for the following reasons:

(1) mistake, inadvertance, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence could not have been discovered in time to move for a New Trial under 59(b);

(3) fraud (wheather previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier

judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; (6) any other reason that justifies relief.

(A) ~~First~~ First Extraordinary Circumstance.

In Texas the first step in a criminal trial is Arraignment Vern. Texas Code Crim. Proc. art. 27.01. Petitioner holds this action VOID, or ~~voidable~~ voidable action took place at the 159/217th Judicial District Court of Angelina County, Texas. (SEE: DNA Appeal No. 019 CR, or Tex. Habeas Corpus #No. 46 CR)

Texas Law at Waiver Of Indictment: Article 1.141 Tex. C. Crim. Proc. hold a "radical defect" in Bridges' cause, that which is contrary to the principles of law, as distinguished from mere rules of procedure, that constitutes a complete defect in the proceedings. Holman v. Mayor, 34 Tx 668 (1871); "Texas Fair Defense Act" Revia v. State, 649 S.W 2d 625 (Tex. Crim. App. 1983); Simmons v. U.S., 390 US 377 (1968) holds @ Revia Article 28.01 §2 pre-trial: ("A defendant's failure to raise some constitutional claim at Tex C. Crim. P. art 28.01 pre-trial hearing, does not bar him later raising it up to the day of trial.") Arraignment is pre-trial until resolved, and petitioner asks [did the State have jurisdiction or issue a voidable Order.]

The waiver entered via Article 1.141 Tex. C. Crim. P. holds, and states: "A person represented by

legal counsel", may in open court or by written instrument voluntarily waive the right to be accused by indictment of any offense other ~~than~~ than capitol offense. [Absent] John Heath Jr. Counsel of choice - Paid in full.

Petitioner's Counsel had a signed contract to defend Bridges at criminal cause no. 27979, and he breached this contract on file, within records. Texas cities:

> "If a court violates a procedural statue. [Article 1.141 {Attorney Heath "Absent"} A breach] it has committed error which may render a conviction base upon that error subject to reversal, ... and it is a "voidable conviction."

Ex parte McCain, 67 S.W.3d 204 (Tex.Crim.App. 2002); City of Lufkin, v. McVicker, 510 S.W. 2d 141 (Tex. Civ. App. Beaumont 1973); In re Mareno, 4 S.W.3d 278 Explains: A "void act" is a judicial act which is entirely null within itself, not binding on either party, and which is not susceptable of ratification, ... its nullity cannot be waived.

Fed. R. Civ. P. Rule 60(b)(4) must issue, its "grand reservoir of equitable power to do justice." The U.S. District Court did take jurisdiction over petitioners case at "Show Cause Order" Docket No. 7 (04/10/2017). Then "abused its discretion" in the following:

1) The voidable act allowing the "waiver of indictment", not held within Brewer Vs. Williams, 430 US 387 (1997) (An Order to be valid, a waiver must be entered after the

defendant has been informed <u>with counsel present.</u>)

Petitioner did claim "Not Guilty", in the record, and the standin attorney is "Conflict" or "abuse of discretion" making a "breach of contract" a voidable action, inwhich "a document inwhich the terms of a contract are written", Blacks Law 10th Ed.: A contract is a promise or set of promises, for breach of which the law gives remedy.

The U.S. District Court has F.R.C.P. 60(e)(3) "set aside a judgment for fraud on the Court". In other powers to grant relief. Petitioner holds the Voidable Action, upon this motion to the Honorable Court. "No Authority need to be cited for the proposition that, when any judgment rendered by it is Void, and unenforceable." <u>Hooker v. Boles</u>, 345 F2d 285, 286 (1965); <u>Main v. Thibodot</u>, 100 S.Ct 2052 (1980); An Order is void when a court has no power or jurisdiction to render it. <u>Urbish v. 127th Judicial District Court</u> 159th/217th Judical District Court issued voidable waiver within a broken contract, that cannot be held within the power of courts to inforce, or due process in civil cause is reviewable relief, via breach.

(B) Other Extraordinary Circumstances

Petitioner holds Docket No. 5 Correspondence; #25 Response, in conclusions of law memorandums with

its exhibits; Docket No. 26 Notice To The Court re Additional Exhibits, as more than the one(1) filed at State Habeas Corpus, and the trial court did "add" additional documents of state trial (after State Habeas ruling; thus violation of Supreme Court's ruling in Cullen v. Pinholster, 563 US 170 181-82(2011) (Noted at "notes" bottom pg 2 Docket #62-1) this is additional, abuse-of-discretion at Federal District Court.

1) Docket No. 5, was before show cause order; Court failed to strike or deny;
2) Docket No. 25, is after show cause order, and is an expansion of the record;
3) Docket No. 26 is also after jurisdictional show cause order, and is "Extraordinary Circumstances."

Buck v. Davis, 137 S.Ct 759(2017); Gonzalez v. Crosby, 545 US. 524, 125 S.Ct. 2641 (2005).

(C) Final Extraordinary Circumstance

The District Court did mistakenly, inadvertance, suprise, or excusable neglect {60(b)(1)} in ruling that petitioner had never had post-conviction counsel. SEE: Docket No. 62-1 pg 2 line 13 in text. (John Reeves at PDR) In Adams v. Thaler, 679 F3d 312 (5th Cir 2011), 132 S.Ct. 1995 (2012) explains a 60(b) motion does not contain a habeas corpus claim, and thus should Not be construed as a succesive petition, when the motion attacks, not the substance of a federal court's resolution of a claim on the merits, but some defect in the integrity of the Federal Habeas Corpus proceedings.

Thus, when the U.S. District Court {Adams} transfered the 60(b) Motion to the 5th Circuit Court Of Appeals stated: "Where, under state law claims of ineffective assistance of trial counsel must be raised in an intial-review collateral proceeding, a procedural default will not bar a Federal Court from hearing a substantial claim of ineffective assistance at trial, if the intial-review collateral proceedings, there was no counsel in that proceeding, or was ineffective." This is equitable tolling and not constitutional ruling. Id @ Adams.

Petitioner holds the Federal District Court's statement as: "the record (shows) establishes that petitioner has not been represented by counsel in any post-conviction proceedings." SEE: ~~Memoradum~~ Memorandum Order: Docket #62-1 pg. 2 Lines 12-13. This Mistake holds "extraordinary relief." Buck @ 137 S.Ct 752; Gonzalez V. Crosby, 125 S.Ct. 2641.

In this, the Supreme Court, however, has held that the "erroneous deprivation of the right to counsel of choice" is a "structural error" in violation of the Sixth Amendment and is not subject to harmless-error analysis. U.S. V. Gonzalez-Lopez, 548 US 140, 150-152, 126 S.Ct 2557 (2006). Other "structural errors" include the denial of counsel, the denial of right of self-representation, and the denial of the right to a public trial. Id @ 149.

Bridges was removed from DNA appeal counsel of his self-representation at State's Petition For ~~Discretr~~

Discretionary Review by Order @PD-0546-13 from the Texas Criminal Court of Appeals with Additional {Article 26.04} (And Evidentiary Filings Needed), then the trial court appoints John Reese-Attorney, and he files a joint-motion with state's attorney, with-out (evidentiary or additional filings [NEEDED]), and abandon's Bridges Direct Appeal issue's (Article 1.051 and 26.04 Codes), and gives "Extraordinary 60(b)(1) or (6), as trial court "abuses its discretion" at 60(b)(3) "misconduct by an opposing party", allowing a "Joint Filing" and NO evidentiary hearing ordered by the Court of Criminal Appeals ["vacate, reverse, and remand"], yet the District Court at Federal Habeas Corpus, DID NOT SEE THIS IN THE RECORDS.

The choice of attorney will effect whether and on what terms the defendant cooperates with the prosecution, plea bargins, or decides instead to go to trial. In light of these myrid aspects of representation, the erroneous denial of counsel, bears directly on the framework within which the trial proceeds, or indeed on whether it proceeds at all... Many counseled decisions, including those involving plea bargains... do not even concern the conduct at trial at all. Id @150. Petitioner Bridges had been denied counsel of choice, and self-representation, this gives "Extraordinary Relief".

The 159th/217th Judicial District Court is a goverment agenicy, and they cannot have "breached, voidable contracts" held within the "courts due coarse of law" or the very sovereignty within the United States or statehood therein, held by the citizens are at risk.

Broken/Open contracts cannot be acted upon nor completed until they are resolved; Civil process brought before a controling court for resolution or suit, as Due Process requires.

The United States Constitution was signed and the ratifying held by contract with the citizens of this nation, upon the signatures and writers is the very fabric of this nation. RELIEF is warranted and petitioner Bridges ask the Court to act, grant all that is deemed just and proper as law requires.

Respectfully Submitted
Weldon Bridges
WELDON BRIDGES
pro-se

filed 12/21/2020

Verification of Service

I, Weldon Bridges understand that a false statement or answer in this case, will subject me to the penalties of perjury. I declare (verify, or certify and state) that the foregoing is true and correct.

Weldon Bridges

State Of Texas
County Of Liberty

Affidavit

I, WELDON BRIDGES, TDCJ-CID No. 1585306, depose and say that I am eighteen(18) years of age or older, of sound mind and body, and I am capable of making the following statement:

On December 21, 2020, I Weldon Bridges did file a {60(b) Motion} within Case No. 9:17-cv-2, United States District Court, Lufkin Division, holding United States Supreme Court Law: 28 USCS § 1254; Federal Rules Of Civil Procedure.

With this document I request the District Court to review its findings at Memorandum Opinion and Order (page 6), that is subject to ~~the~~ (civil action) of "implicit factual findings" of "incorrectness of presumptions or mistake, inadvertance" upon Texas Court Of Criminal Appeals Order, issued on November 20, 2013, and this Order is Direct Appeal. {PD-0546-13_1.051 Order} Docket 19-22. Texas Code Of Criminal Procedure Article 1.051, and 26.04 are Not DNA Laws. [Article 64.05 is DNA-Counsel], the 06/19/2017 docket filing was from the State, thus, Direct Appeal Order.

This factual filing holds: "any other reason" of the extraordinary circumstances of 60(b)(6), that justifies relief.

I, Weldon Bridges, do hereby swear and affirm, state, certify, verify, or declare that the foregoing is true and correct.

Respect fully Submitted
Weldon Bridges
WELDON BRIDGES

Filed on Feb. 12, 2021.

P.S. Please forward live docket.

cc: file

****NOT FOR PRINTED PUBLICATION****

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

WELDON BOYCE BRIDGES	§	
VS.	§	CIVIL ACTION NO. 9:17-CV-2
DIRECTOR, TDCJ-CID	§	

MEMORANDUM OPINION AND ORDER

Petitioner, Weldon Boyce Bridges, a prisoner currently confined at the Dalhart Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se* and *in forma pauperis*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Factual & Procedural Background

Petitioner was indicted on two counts of aggravated sexual assault of a child on April 29, 2008 in the 159th District Court of Angelina County in CR-27979-A . Indictment, pgs. 20-21 (docket entry no. 19-6). On July 15, 2009, as part of a plea agreement, petitioner pleaded guilty to count two of the indictment and was found guilty and sentenced to twenty-two years' imprisonment. Petitioner waived his right to appeal. Clerk Record (docket entry no. 19-7); Written Plea Admonishments-Waivers-Stipulations, pgs. 66- 70; Supplemental Admonishments, pgs. 71-72; Waiver of Right to Appeal, pg. 73-75; *see also* Clerk Record, Judgment of Conviction, pgs. 77-78. Count one was dismissed as part of the plea agreement. Clerk Record, Motion to Dismiss, pg. 74 (docket entry no. 19-7).

On January 2, 2012, petitioner requested DNA testing pursuant to Article 64.01(c) of the Texas Code of Criminal Procedure. Clerk Record, pgs. 87-89 (docket entry no. 19-7). The trial

court denied the motion on May 25, 2012, stating that (1) previous DNA testing was done, (2) that DNA testing did not show any exculpatory evidence, (3) there is no evidence newer techniques would be more accurate, and (4) there were no reasonable grounds to file a motion for DNA testing. Clerk Record, Order, pg. 96 (docket entry no. 19-7). Petitioner, proceeding *pro se*, appealed the denial of his motion for forensic DNA testing on June 11, 2012. Clerk Record, Notice of Appeal, pg. 100 (docket entry no. 19-7). On appeal, petitioner also attempted to raise issues relating to the underlying conviction and trial. *Id.* The Sixth Court of Appeals affirmed the trial court's order denying the motion for forensic DNA testing on April 11, 2014. Clerk Record, *Bridges v. State* of Texas, No. 06-12-00109-CR (docket entry no. 19-3).[1] The Sixth Court of Appeals also noted that because petitioner waived his right to appeal the underlying conviction at the time he entered his guilty plea, the appeals court could not consider any issues relating to the conviction. *Id.* Petitioner filed a Petition for Discretionary Review on May 15, 2014. Clerk Record, PD-0628-14, pg. 18 (docket entry no. 19-13). The Petition for Discretionary Review was refused on July 23, 2014. Clerk Record, Electronic Record, pg. 1 (docket entry no. 20-10).

Petitioner filed his state application for writ of habeas corpus on June 17, 2015, the date he certified he placed the application in the prison mailing system. Clerk Record, State Writ, pgs. 7-48 (docket entry no. 20-20). The Texas Court of Criminal Appeals denied the state application for writ of habeas corpus without a written order on January 13, 2016. Clerk Record, *Ex parte Bridges*, WR-

[1]Petitioner originally appealed to the Twelfth Court of Appeals. The case was transferred to the Sixth Court of Appeals by the Texas Supreme Court pursuant to its docket equalization efforts. Originally, the Sixth Court of Appeals dismissed petitioner's post-conviction motion for DNA testing due to petitioner's failure to file an appellate brief. *Bridges v. State*, No. 06-12-00109-CR, 2013. Petitioner filed a Petition for Discretionary Review. On November 20, 2013, the Texas Court of Criminal Appeals vacated the judgment of the Sixth Court of Appeals and remanded the case consistent with its opinion. Clerk Record, *Bridges v. State*, PD-0546-13, pgs. 6-7 (docket entry no. 19-9).

81,290-03 (docket entry no. 20-17).[2] Petitioner filed this federal writ of habeas corpus on December 22, 2016, the date petitioner certified he placed the petition in the prison mailing system. Original Petition (docket entry no. 1).

The Petition

Petitioner argues the following points of error :

1. Ineffective Assistance of Counsel due to:

   a. failure to have counsel present at arraignment and evidentiary hearings;
   b. failure to make hearsay objections and unspecified objections in general; failure to investigate and develop exculpatory evidence; and
   c. denied counsel at post-conviction DNA hearing; first-tier review (DNA Appeal).

2. Jurisdictional-Abuse of Discretion due to:

   a. convicting court failed to arraign petitioner;
   b. convicting court denied petitioner counsel;
   c. convicting court issued void orders on DNA appeal relating to disqualification and recusal; and
   d. the Texas Court of Criminal Appeals denied petitioner counsel on appeal and post-conviction writ of habeas corpus proceedings.

3. Violations of Due Process of Law because:

   a. the State withheld exculpatory evidence;
   b. the entire file was not forwarded during the state habeas proceedings;
   c. petitioner did not have counsel at pre-trial, preliminary, and evidentiary hearings;
   d. petitioner denied a complete record on appeal;
   e. the State submitted an affidavit from a dismissed cause; and

[2]Petitioner filed additional pleadings in state court that are not directly related this federal petition for writ of habeas corpus: "Writ of Prohibition" filed on April 4, 2014 and denied on June 11, 2014. *Ex parte Bridges*, WR-81,290-01 at 1, Action Sheet (docket entry no. 20-11); "Writ of Mandamus" filed on September 14, 2015 and denied on October 7, 2015. *Ex parte Bridges*, WR-81,290-02 at 3-4, Action Sheet (docket entry no. 20-15); and "Writ of Mandamus" filed on December 21, 2015 and denied January 13, 2016. *Ex parte Bridges*, 81, 290-04 at 2-3, Action Sheet (docket entry no. 20-21).

f. the local rules of court were not followed in that petitioner was arraigned in the 217th Judicial District Court without counsel present.

4. Actual Innocence because trial counsel failed to investigate or submit exculpatory evidence that:

a. alleged victim was at camp during time frame;
b. the alleged victim suffers from mental issues;
c. the alleged victim's state of mind was affected by marijuana;
d. there was no physical sign of trauma, injury, or penetration; and
e. the outcry was in retaliation for petitioner's persecution of the father and divorce of the mother.

Original Petition (Docket entry no. 1).

Response

The Government was ordered to Show Cause on April 10, 2017 (docket entry no. 7) and filed a Response on June 19, 2017 (docket entry no. 18). The Government argues petitioner's claims are time-barred, waived or not cognizable on federal habeas review.

Standard of Review

Title 28 U.S.C. § 2254 authorizes a district court to entertain a petition for writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment if the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The court may not grant relief on any claim that was adjudicated in state court proceedings unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court reaches a conclusion opposite to a decision reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a materially indistinguishable set of facts. *Williams v.*

Taylor, 529 U.S. 362, 412-13 (2000). An application of clearly established federal law is unreasonable if the state court identifies the correct governing legal principle, but unreasonably applies that principle to the facts. *Id.* An unreasonable application of law differs from an incorrect application; thus, a federal habeas court may correct what it finds to be an incorrect application of law only if this application is also objectively unreasonable. *Id.* at 409-411. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (citation omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* The Supreme Court has noted that this standard is difficult to meet "because it was meant to be." *Id.*

In addition, this court must accept as correct any factual determination made by the state courts unless the presumption of correctness is rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e). The presumption of correctness applies to both implicit and explicit factual findings. *See Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001) ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact.").

Analysis

1. Statute of Limitations

Respondent argues petitioner's claims 1(a) and (b), 2(a), 3(a), (c), (e) and (f), and 4(a)-(c) are time-barred.

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (the Act), Pub.

L. 104-132, 110 Stat. 1218, on April 24, 1996. Title I of the Act applies to all federal petitions for habeas corpus filed on or after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Because petitioner filed the instant petition after its effective date, the Act applies to his petition.

Title I of the Act substantially changed the way federal courts handle habeas corpus actions. One of the major changes is a one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). The one year period is calculated from the latest of either (A) the date on which the judgment of conviction became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which an 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 Supreme Court initially recognizes a new constitutional right and makes the right retroactively applicable to cases on collateral review; or (D) the date on which the facts supporting the claim became known or could have become known through the exercise of due diligence. *See id.* § 2244(d) (1)(A)-(D).

Ordinarily, the one-year limitation period starts to run 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). Here, petitioner pleaded guilty and was sentenced on July 15, 2009. Petitioner did not file a direct appeal of the conviction. Thus, the state court conviction became final on August 14, 2009, at the conclusion of thirty days in which petitioner could timely file a direct appeal. *See Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003); TEX. R. APP. P. 26.2 (a). Because petitioner filed his federal petition more than one year after his conviction became final, a literal application of Section 2244(d)(1) renders his December 22, 2016 filing untimely.

Petitioner has not shown that an alternate start date is applicable to his claims relating to his guilty plea. Petitioner has not shown that any unconstitutional "state action" prevented him from seeking federal habeas corpus relief prior to the end of the limitation period. 28 U.S.C. § 2244(d)(1)(B). Moreover, petitioner's claims do not concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review. 28 U.S.C. § 2244(d)(1)(C). Finally, petitioner has not shown that he could not have discovered the factual predicate of his claims until a date subsequent to the date his conviction became final. 28 U.S.C. § 2244(d)(1)(D).

a. Statutory Tolling

The Act expressly and unequivocally 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." 28 U.S.C. § 2244(d)(2). Thus, a state petition for habeas relief is "pending" for the Act's tolling purposes on the day it is filed through (and including) the day it is resolved. *See Windland v. Quarterman*, 578 F.3d 314, 317 (5th Cir. 2009).

According to petitioner's federal application for writ of habeas corpus, he filed his state writ of habeas corpus on June 17, 2015. This is almost five years past the August 14, 2010 filing deadline. And, although a motion for DNA testing qualifies as "other collateral review" under 28 U.S.C. § 2244(d)(2), petitioner's motion for DNA testing was filed on January 2, 2012, a year and a half past the filing deadline. *See Hutson v. Quartmernan*, 508 F.3d 236, 239 (5th Cir. 2007). It is well settled that a document filed in state court after the limitations has expired does not operate to statutorily toll the limitations period. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000).

As such, the state application and motion for DNA testing fail to toll the federal filing deadline.

b. Actual Innocence

Petitioner asserts actual innocence in order to overcome the procedural bar. The Supreme Court has held that "actual innocence, if proved, serves a gateway through which a petitioner may pass" despite the expiration of the statute of limitations applicable to federal habeas applications. *McQuiggin v. Perkins*, 569 U.S. 383, 385 (2013). A petitioner attempting to overcome the expiration of the AEDPA statute of limitations by showing actual innocence is required to produce new evidence sufficient to persuade the district court that "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

To open the gateway to federal habeas review, a petitioner asserting his actual innocence of the substantive offense must: (1) present "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," (2) "that was not presented at trial;" and (3) must show, that in light of this new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 537 (2006) (citing *Schlup*, 513 U.S. at 299)).

Here, the arguments petitioner proffers that could be interpreted as a claim of actual innocence are supported by evidence that was available to him prior to the entry of his guilty plea. Furthermore, petitioner's guilty plea inherently defeats his ability to make a showing of actual innocence that is required. "Actual innocence," in this context, means factual innocence and not mere legal sufficiency. *Bousely v. United States*, 523 U.S. 614, 623-24 (1998). Indeed, some circuit courts have held a guilty plea forecloses a petitioner from arguing actual innocence to extend the

statutory time period under *McQuiggin*. *Jackson v. United States*, 2013 WL 5295701, *3 (E.D. Wis. Sept. 18, 2013); *Sidener v. United States*, 2013 WL 4041375, *3 (C.D. Ill. Aug. 8, 2013) ("Petitioner's admission to the factual basis demonstrates that Petitioner cannot make a showing of actual innocence."); *United States v Cunningham*, 2013 WL 3899335, n. 3 (S.D. Tex. July 27, 2013). Petitioner's evidence of innocence is insufficient to demonstrate that it is more likely than not that no reasonable juror would have convicted him in light of the newly presented evidence, especially in light of petitioner's guilty plea. *Schlup*, 513 U.S. at 327. Petitioner has simply failed to establish actual innocence to overcome the procedural bar.

c. Equitable Tolling

Petitioner has also not demonstrated any facts entitling him to equitable tolling. *See Davis v. Johnson*, 158 F.3d 806, 807 (5th Cir. 1998) (holding that the limitations period can be equitably tolled in extraordinary circumstances). Equitable tolling is a discretionary doctrine turning on the facts and circumstances of each case and petitioner bears the burden of establishing entitlement to equitable tolling in the AEDPA context. *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), *cert. denied* 531 U.S. 1164 (2001); *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000), *cert. denied* 531 U.S. 1035 (2000); *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000). For equitable tolling to apply, the applicant must diligently pursue his Section 2254 relief and equity is not intended for those who sleep on their rights. *Fisher v. Johnson* 174 F.3d 710, 715 (5th Cir. 1999); *Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999).

In the present case, petitioner has not shown he acted diligently while pursuing habeas relief in both the federal and state courts. As a result, he has failed to demonstrate that any principles of equitable tolling save his petition.

2. Guilty Plea Waived All Claims Not Relating to the Voluntariness of the Plea

Alternatively, petitioner's claims 1(a) and (b), 2(a), 3(a), (c), (e) and (f), and 4(a)-(c) and any other of petitioner's claims relating to the time before or at the time of his plea were waived by his voluntary guilty plea. Because petitioner voluntarily pleaded guilty to the conviction he is now challenging, petitioner waived the right to challenge all non-jurisdictional defects in his proceedings.

It is axiomatic that a guilty plea is valid only if entered voluntarily, knowingly, and intelligently, "with sufficient awareness of the relevant circumstances and likely consequences." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005); *United States v. Hernandez*, 234 F.3d 252, 254 (5th Cir. 2000). A plea is intelligently made when the defendant has "real notice of the true nature of the charge against him." *Bousley v. United States*, 523 U.S. 614, 618 (1998) (internal quotation marks omitted). And a plea is "voluntary" if it does not result from force, threats, improper promises, misrepresentations, or coercion. *United States v. Amaya*, 111 F.3d 386, 389 (5th Cir. 1997). The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *United States v. Juarez*, 672 F.3d 381, 385 (5th Cir. 2012).

The record in this case demonstrates petitioner's plea was voluntary and intelligent and were not the result of any misrepresentation. To start, the voluntariness of petitioner's plea is demonstrated by his signature on the Written Plea Admonishments-Waivers-Stipulations and Supplemental Admonishments. Pgs. 66-72 (docket entry no. 19-7). These documents demonstrate petitioner was admonished as to the maximum punishment range for aggravated sexual assault of a child (first degree felony for a term of life or any term of not more than 99 years or less than 5 years). Petitioner also makes the following concessions in his plea agreement:

> 1. I understand the foregoing admonishments from the Court and am aware of the consequence of my plea. I further state that I am mentally competent, that my plea is freely and voluntarily made.
>
> 2. I am totally satisfied with the representation provided by my attorney who provided fully effective and competent representation.
>
> 3. Under Art. 1.14 C.C.P. I give up all rights given to me by law, whether of form, substance or procedure, including any time limitations imposed under the U.S. Constitution or Chapter 32 C.C.P.
>
> 4. Joined by my attorney, I give up all right to a jury in this case under Art. 1.13 C.C.P., and I give up my right to appearance, confrontation and cross examination of witnesses under Art. 1.15 C.C.P. I consent to oral and written stipulations of evidence in this case. I give up my right to remain silent, both at the guilt-innocence and punishment phases of my trial.
>
> 5. I also waive and give up the 30 days provided in which to file a Motion for New Trial, Motion for Arrest of Judgment and Notice of Appeal.
>
> 6. I completely understand all of the written waivers, stipulations, and motions herein stated in connection with the plea, and each was done freely, voluntarily and intelligently.
>
> 7. The State and I mutually recommend to the Court that punishment in this cause be assessed at 22 years in prison.
>
> 8. Understanding and agreeing to all of the above, I freely and voluntarily plead guilty and confess my guilt to having committed each and every element of the offense alleged in the indictment or information by which I have been charged in this cause.

Id. The District Attorney, petitioner's trial counsel and the Court also signed the agreement after concluding that petitioner was legally competent to stand trial and that the statement made by petitioner were freely and voluntarily made and entered and that petitioner understood the admonitions given to him by the Court and that he was aware of the consequences of his plea. *Id.*

Petitioner's signature on the guilty plea documents is prima facie proof of the validity of the plea and is entitled to "great evidentiary weight." *Theriot v. Whitley*, 18 F.3d 311, 314 (5th Cir.

1994); *United States v. Abreo*, 30 F.3d 29, 32 (5th Cir. 1994) (citing *Hobbs v. Blackburn*, 752 F.2d 1079, 1081 (5th Cir. 1985)). Petitioner's formal declarations in open court also carry "a strong presumption of verity" and constitute a formidable barrier to any subsequent collateral attack. *United States v. Kayode*, 777 F.3d 719, 729 (5th Cir. 2014) (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). Because petitioner has not provided any evidence or argument that would overcome these "strong presumptions of verity," this Court denies any allegation made by petitioner concerning the validity of his guilty plea. *Blackledge*, 431 U.S. at 74 (finding "[t]he subsequent presentation of conclusory allegations which are unsupported by specifics is subject to summary dismissal.").

Furthermore, by entering a knowing, intelligent and voluntary guilty plea, a defendant waives all non-jurisdictional defects preceding the plea. *Tollett v. Henderson*, 411 U.S. 258, 265 (1973); *United States v. Scruggs*, 714 F.3d 258, 261-62 (5th Cir. 2013). This rule encompasses errors of constitutional dimension that do not affect the voluntariness of the plea – including claims of ineffective assistance of counsel – unless the alleged ineffectiveness relates to the voluntariness of the guilty plea. *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983) (waiving claims of ineffective assistance, except for claims related to voluntariness of plea).

Here, petitioner argues counsel was ineffective as he was not present at the arraignment and evidentiary hearings, failed to make hearsay objections and unspecified objections in general and failed to investigate and develop exculpatory evidence. Original Complaint (docket entry no. 1). But, petitioner fails to demonstrate how this alleged ineffectiveness relates in any way to the voluntariness of his guilty plea. Accordingly, petitioner's claims are waived by his knowing, voluntarily, and intelligent guilty plea.

3. Infirmities in State Habeas Proceedings Not Cognizable

Petitioner's claims 1(c), 2(b)-(d), and 3(b) and (d) relate to petitioner's motion for post-conviction DNA testing. Petitioner's claims raise only questions regarding his rights under state law, not federal law, and are not cognizable on federal habeas corpus review. *See* 28 U.S.C. § 2254(a); *Johnson v. Thaler*, 2010 WL 2671575, at *3 (S.D. Tex. June 30, 2010) (citing *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999) (claim of ineffective assistance during post-conviction DNA testing proceeding presents no federal constitutional issue and does not warrant relief). These claims simply fail to raise a federal constitutional issue as the challenges attack a proceeding collateral to the conviction and detention and are foreclosed by circuit precedent. *See Rudd v. Johnson,* 256 F.3d 317, 320 (5th Cir. 2001) *(citing Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995).

4. Actual Innocence

To the extent petitioner asserts a "freestanding" claim of actual innocence, this claim does not provide a basis for federal habeas relief. *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000) (citing *Herrera*, 506 U.S. 390, 400 (1993)). "This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact." *Herrera*, 506 U.S. at 399. Although the *Herrera* court left open the question of wether, in a capital case, "a truly persuasive demonstration of 'actual innocence' made after trial would . . . warrant habeas relief if there were no state avenue open to process such a claim," the Fifth Circuit has consistently rejected this theory.[3] *Hererra*, 506 U.S. at 417; *see also*

[3]In later revisiting the issue of actual innocence, the Supreme Court declined to resolve the question of whether freestanding actual-innocence claims are to be recognized in federal habeas proceedings. *House v. Bell*, 547 U.S. 581, 555 (2006).

Cantu v. Thaler, 632 F.3d 157, 167 (5th Cir. 2011) (vacated on other grounds); *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009); *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003) (collecting cases). Because petitioner has not shown an independent constitutional violation, petitioner's freestanding claim of actual innocence is not cognizable on federal habeas review.

"Actual innocence means 'factual innocence and not mere legal insufficiency.'" *United States v. Jones*, 172 F.3d 381, 384 (5th Cir. 1999) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). "To establish actual innocence, [the] petitioner must demonstrate that, 'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him.'" *Bousley*, 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 328 (1995)). Petitioner has failed to provide the Court with any new or newly discovered evidence to support his claim. *Lucas v. Johnson*, 132 F.3d 1069, 1074 (5th Cir. 1998) (evidence must be "newly discovered," and not evidentiary material that was in "essence and character" presented to, or available to present to, the jury). Petitioner, therefore, has failed to offer "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial" to support his claim that he is actually innocent of committing aggravated sexual assault of a child. *Schlup*, 513 U.S. at 324.

"[E]ven if a truly persuasive claim of actual innocence could be a basis for relief, the Supreme Court made clear that federal habeas relief would only be available if there was no state procedure for making such a claim." *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003). The state has already provided a forum in which petitioner's claim of actual innocence was reviewed and denied. *Ex parte Bridges*, No. 81,290-03 (Tex. Crim. App. 2016) (docket entry no. 20-17); *see also Graves*, 351 F.3d at 151. Petitioner has not shown that this decision was contrary to, or involved

an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d). Petitioner's freestanding claim of actual innocence should be denied.

ORDER

It is therefore **ORDERED** that this petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is **DISMISSED**.

Furthermore, after a review of the record in this case, the Court is of the opinion petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying post-conviction collateral relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253. The standard for a certificate of appealability requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the petitioner need not establish that he would prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

In this case, petitioner has not shown that any of the issues would be subject to debate among jurists of reason. The questions presented are not worthy of encouragement to proceed further. Therefore, petitioner has failed to make a sufficient showing to merit the issuance of certificate of

appealability. Accordingly, a certificate of appealability will not be issued.

A Final Judgment will be entered separately.

So **ORDERED** and **SIGNED March 6, 2020.**

Ron Clark, Senior District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

WELDON BOYCE BRIDGES	§	
VS.	§	CIVIL ACTION NO. 9:17-CV-2
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

Pursuant to the Memorandum Opinion and Order filed in this matter this date, it is

ORDERED that this petition for writ of habeas corpus is **DISMISSED** with prejudice.

All relief not previously granted is **DENIED**.

IT IS SO ORDERED.

So **ORDERED** and **SIGNED March 6, 2020.**

Ron Clark

Ron Clark, Senior District Judge

United States Court of Appeals for the Fifth Circuit

No. 20-40296

WELDON BOYCE BRIDGES,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 9:17-CV-2

Before JONES, COSTA, and WILSON, *Circuit Judges*.

PER CURIAM:

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

IT IS FURTHER ORDERED that the motion for reconsideration of the denial of COA is DENIED.