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Appendix (A)

Rule 60 (b) Motion
cause no. 20-50825

pages .001 - .030

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

**LYLE W. CAYCE
CLERK**

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 09, 2021

#02093641
Mr. Hector David Sanchez
CID O.L. Luther Prison
1800 Luther Drive
Navasota, TX 77868-0000

No. 20-50825 In re: Hector Sanchez

Dear Mr. Sanchez,

We are in receipt of your motion to seek relief from this Court's final judgment of December 28, 2021 denying the motion for authorization, etc., along with brief in support and your motion to appoint counsel and to proceed in forma pauperis.

28 U.S.C. Section 2244(b)(3)(E) does not permit review of the denial of your request to file a successive petition. Therefore, we are taking no action on these documents.

As a matter of clarity filings in this court are governed strictly by the Federal Rules of Appellate Procedure. We cannot accept motions submitted under the Federal Rules of Civil Procedure.

Sincerely,

LYLE W. CAYCE, Clerk

Claudia N. Farrington

By:

Claudia N. Farrington, Deputy Clerk
504-310-7706

A.001

United States Court of Appeals
for the Fifth Circuit

No. 20-50825

IN RE: HECTOR DAVID SANCHEZ,

Movant.

Motion for an order authorizing
the United States District Court for the
Western District of Texas to consider
a successive 28 U.S.C. § 2254 application

Before DENNIS, WILLETT, and Ho, *Circuit Judges*.

PER CURIAM:

Hector David Sanchez, Texas prisoner # 02093641, pleaded guilty to one count of sexual assault of a child and one count of indecency with a child by contact and was sentenced in June 2016 to 20 years of imprisonment on each count to run concurrently. Sanchez now moves for leave to file a second or successive 28 U.S.C. § 2254 application.

This court may authorize the filing of a second or successive § 2254 application only if the applicant makes a *prima facie* showing that either: (1) his claims rely on a new rule of constitutional law that was made retroactive to cases on collateral review by the Supreme Court and was previously unavailable or (2) the factual predicate for the claims could not have been discovered previously through due diligence, and the underlying facts, if proven, would establish by clear and convincing evidence that, but

No. 20-50825

for the constitutional error, no reasonable trier of fact would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2), (b)(3)(C).

In his motion for authorization, Sanchez seeks to raise claims that his counsel was ineffective because counsel failed to comply with his request to pursue a direct appeal, that counsel failed to consult with him about appealing from his guilty plea, and that his appeal waiver was unknowing and involuntary. Sanchez relies on two Supreme Court decisions, *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and *Garza v. Idaho*, 139 S. Ct. 738 (2019). He contends that *Garza* set forth a new rule of constitutional law made retroactive by the Supreme Court on collateral review that was previously unavailable.

In *Flores-Ortega*, decided in 2000, 19 years before Sanchez filed his first § 2254 application, the Supreme Court noted that it had “long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.” *Flores-Ortega*, 528 U.S. at 477 (citing *Rodriguez v. United States*, 395 U.S. 327 (1969)). According to the Supreme Court, the prejudice standard set forth in *Flores-Ortega* “breaks no new ground, for it mirrors the prejudice inquiry applied” in two previous cases, *Hill v. Lockhart*, 474 U.S. 52 (1985), and the 1969 *Rodriguez* decision. *Flores-Ortega*, 528 U.S. at 485.

In *Garza*, “the crux of [the] case” was “whether *Flores-Ortega*’s presumption of prejudice applies despite an appeal waiver.” *Garza*, 139 S. Ct. at 746-47. The Supreme Court held in *Garza* “that the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether a defendant has signed an appeal waiver,” noting that “[t]his ruling follows squarely from *Flores-Ortega* and from the fact that even the broadest appeal waiver does not deprive a defendant of all appellate claims.” *Id.* at 749-50. Inasmuch as the holding of *Garza* is based on *Flores-Ortega*, which did not

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announce a new rule of constitutional law for purposes of § 2244(b)(2)(A), it follows that *Garza* likewise did not announce such a new rule.

Accordingly, IT IS ORDERED that Sanchez's motion for authorization to file a successive § 2254 application is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

September 29, 2020

#02093641
Mr. Hector David Sanchez
CID O.L. Luther Prison
1800 Luther Drive
Navasota, TX 77868-0000

No. 20-50825 In re: Hector Sanchez

Dear Mr. Sanchez,

We have received and filed your motion to file a second application for a 28 U.S.C. § 2254 motion for habeas corpus.

You have **30 days** from the date of this letter to file with this court a proper motion for authorization to proceed in the district court and to send the documentation below. **The motion may not exceed 30 pages or 13,000 words pursuant to FED. R. APP. P. 32(a)(7).** Please use the case number shown above in your motion. If you fail to file a proper motion for authorization within this 30 day period, or properly request an extension of time, the clerk will enter an order dismissing your application for failure to comply.

If you wish to file a second or successive § 2254 petition in the district court, you must make a *prima facie* showing that you satisfy either of the two conditions found in 28 U.S.C. § 2244(b)(2):

- (A) that your claim relies on a new rule of constitutional law, made retroactive by the Supreme Court, that was previously unavailable; **or**,
- (B) the factual predicate for your claim could not have been discovered previously through the exercise of due diligence, **and** the facts underlying your claim, if proven by clear and convincing evidence, would be sufficient to establish that a reasonable trier of fact would not have found you guilty of the underlying offense.

You must attach the following documentation to your § 2254 motion to this court:

- (1) a copy of the proposed § 2254 petition you are requesting permission to file in the district court;

- (2) copies of all previous § 2254 petitions challenging the judgment or sentence received in any conviction for which you are currently incarcerated; all previous § 2241 petitions challenging the terms and conditions of your imprisonment;
- (3) any complaint, regardless of title, that was subsequently treated by the district court as a § 2254 motion or § 2241 petition;
- (4) all court opinions and orders disposing of the claims advanced in (2) above; and
- (5) all magistrate judge's reports and recommendations issued in connection with the claims advanced in (2), above.

Do not submit state court filings. This court does not require and will not address documents filed in a state court.

If, after due diligence and through no fault of your own, you cannot obtain the documents described above, you should submit an affidavit describing the steps you took to obtain them and explaining why you were unsuccessful. If possible, you should also identify by court, case name and case number any proceeding for which you cannot obtain the documents in (2) and (3) above.

The 30 day time limit within which this court must address your § 2254 motion will not begin to run until the clerk's office receives your response to this letter.

Sincerely,

LYLE W. CAYCE, Clerk

Claudia N. Farrington

By:

Claudia N. Farrington, Deputy Clerk
504-310-7706

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50290

United States Court of Appeals
Fifth Circuit

FILED

April 14, 2020

Lyle W. Cayce
Clerk

HECTOR DAVID SANCHEZ,

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
USDC No. 5:19-CV-59

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Hector David Sanchez, Texas prisoner # 02093641, pleaded guilty to one count of sexual assault of a child and one count of indecency with a child by contact; he was sentenced on June 7, 2016 to concurrent terms of 20 years of imprisonment. He seeks a certificate of appealability (COA) to appeal the denial as time barred of his 28 U.S.C. § 2254 application.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The Supreme Court has held that actual innocence, if proven, serves as a gateway through which a prisoner may raise § 2254 claims despite expiration of the applicable limitations period under 28 U.S.C. § 2244(d). *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). However, the Court reiterated that tenable actual innocence claims are rare because the applicant “does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, 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)).

Sanchez argues that he is actually innocent and should not be precluded by the statute of limitations from raising his claim of ineffective assistance of counsel. He relies upon the actual innocence gateway approved by *McQuiggin* to overcome the time bar. Because Sanchez has not shown “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), his motion for a COA is denied.

We construe his motion for a COA with respect to the district court’s denial of an evidentiary hearing as a direct appeal of that issue. *See Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016). Sanchez fails to demonstrate the existence of any disputed facts that, if resolved in his favor, would have entitled him to habeas relief; therefore, the district court did not abuse its discretion in not conducting an evidentiary hearing. *See id.* at 235.

Sanchez’s motions for leave to proceed in forma pauperis (IFP) on appeal and to stay these proceedings are denied.

COA DENIED; AFFIRMED; IFP DENIED; MOTION TO STAY DENIED.

United States Court of Appeals

**FIFTH CIRCUIT
OFFICE OF THE CLERK**

**LYLE W. CAYCE
CLERK**

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 08, 2019

#02093641
Mr. Hector David Sanchez
CID Wallace Pack Prison
2400 Wallace Pack Road
Navasota, TX 77868-0000

Dear Mr. Sanchez,

We have docketed your appeal. You should use the number listed above on all future correspondence.

You should carefully read the following sections

Filings in this court are governed strictly by the Federal Rules of Appellate Procedure, NOT the Federal Rules of Civil Procedure. We cannot accept motions submitted under the Federal Rules of Civil Procedure. We can address only those documents the court directs you to file, or motions filed under the FED. R. APP. P. in support of the appeal. See FED. R. APP. P. and 5TH CIR. R. 27 for guidance. Documents not authorized by these rules will not be acknowledged or acted upon.

Your motion to proceed in forma pauperis is pending in the district court.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

The clerk's office offers brief templates that may assist counsel in the preparation of the brief. To access the brief templates counsel must log in to CM/ECF and from the Utilities menu, select 'Brief Template'.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention

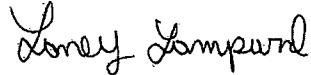
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the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk



By:

Laney L. Lampard, Deputy Clerk

cc:

Ms. Jeannette Clack
Mr. Edward Larry Marshall

E. III

Provided below is the court's official caption. Please review the parties listed and advise the court immediately of any discrepancies. If you are required to file an appearance form, a complete list of the parties should be listed on the form exactly as they are listed on the caption.

Case No. 19-50290

HECTOR DAVID SANCHEZ,

Petitioner - Appellant

v.

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

Respondent - Appellee

E. 112

Appendix

(F)

First §2254 federal habeas corpus petition
cause no. 19-50290

pages .184 - .272



FILED

MAR 11 2019

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY CLERK

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

**HECTOR DAVID SANCHEZ,
TDCJ No. 02093641,**

Petitioner,

Y.

CIVIL NO. SA-19-CA-0059-XR

**LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,**

Respondent.

JUDGMENT

The Court has considered the Judgment to be entered in the above-styled and number cause.

Pursuant to this Court's Dismissal Order of even date herewith, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that Petitioner Hector David Sanchez's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) is **DISMISSED WITH PREJUDICE**. No Certificate of Appealability shall issue in this case. This case is now **CLOSED**.

It is so ORDERED.

SIGNED this the 14th day of March, 2019.

XAVIER RODRIGUEZ
United States District Judge

F. 184

FILED

MAR 11 2019

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY *[Signature]* DEPUTY CLERKUNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISIONHECTOR DAVID SANCHEZ,
TDCJ No. 02093641,

Petitioner,

v.

CIVIL NO. SA-19-CA-0059-XR

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

DISMISSAL ORDER

Before the Court are *pro se* Petitioner Hector David Sanchez's petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 and memorandum in support (ECF No. 1), as well as Petitioner's Response to the Court's Order to Show Cause (ECF No. 5). For the reasons set forth below, Petitioner's federal 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 June 2016, Petitioner pled guilty to one count of sexual assault of a child and one count of indecency with a child by contact. *State v. Sanchez*, No. 14-1183-CR-C (2nd 25th Dist. Ct., Guadalupe Cnty., Tex. June 7, 2016). Pursuant to the terms of the plea bargain, Petitioner was sentenced to twenty years of imprisonment and did not appeal his conviction and sentence. Instead, Petitioner waited until June 19, 2017, to challenging his underlying convictions in two separate state habeas corpus applications, both of which were ultimately denied by the Texas Court of Criminal Appeals without written order on January 24, 2018. *Ex parte Sanchez*, No. 87,156-01, -02 (Tex. Crim. App.).

F.185

On January 22, 2019, Petitioner filed the instant petition for federal habeas corpus relief with this Court. (ECF No. 1). In the petition, Petitioner alleges: (1) he received ineffective assistance of counsel prior to pleading guilty, and (2) affidavits from his accusers establish he is actually innocent of the charges.

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 July 7, 2016, when the time for appealing his judgment and sentence expired. *See Tex. R. App. P. 26.2* (providing a notice of appeal must be filed within thirty days following the imposition of a sentence). As a result, the limitations period under § 2244(d) for filing a federal habeas petition challenging his underlying conviction and sentence expired a year later, on July 7, 2017. Because Petitioner did not file his § 2254 petition until January 22, 2019—over a year and a half 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).

However, Petitioner is entitled to tolling under § 2244(d)(2), which 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.” Petitioner’s state habeas applications were filed on June 19, 2017—less than three weeks before the one-year limitations period expired—and were later denied by the Texas Court of Criminal Appeals January 24, 2018. Accordingly, Petitioner’s state habeas applications tolled the limitations period for a total of 220 days, making his federal petition due on February 12, 2018. Petitioner did not file his § 2254 petition until January 22, 2019.

B. Equitable Tolling

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). As discussed below, Petitioner has not provided this Court with a valid reason to equitably toll the limitations period in this case.

In his federal habeas petition, Petitioner did not attempt to establish any extraordinary circumstance prevented him from filing earlier or 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. 4). In his response, Petitioner asserts his belief that his one-year statute of limitations did not start until his state habeas proceedings concluded, and blames any delay in presenting his federal habeas petition on the fact that an attorney has not been appointed to represent him. But as discussed previously, Petitioner's limitations period began when the time for appealing his judgment *on direct review* expired, not when his state habeas corpus review expired. 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. *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).

Petitioner next argues that prison policies such as lockdowns and inadequate law library hours resulted in limited access to the law library that prevented his timely filing. To prevail on a claim that he was denied adequate access to the law library, a prisoner must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a claim." *Krause v. Thaler*, 637 F.3d 558, 561 (5th Cir. 2011) (emphasizing the prisoner must

factually demonstrate that the subpar library or access thereto actually prevented him from untimely filing his petition); *Egerton v. Cockrell*, 334 F.3d 433, 437 (5th Cir. 2003) (“an inadequate law library does not constitute a rare and exceptional circumstance warranting equitable tolling”). Petitioner has failed to allege specific facts regarding why the prison’s inadequate library or his lack of access thereto prevented him from filing a timely habeas application.

Similarly, Petitioner fails to explain why the relatively short delay (45 days total) caused by the security lockdown constitutes an “extraordinary circumstance” sufficient to warrant equitable tolling. Petitioner states the unit lockdowns are semi-annual, thus he was aware he would be without his legal materials for a brief period of time and that he would need to use the remainder of the one-year AEDPA limitations period to prepare and file his § 2254 habeas petition. Such a circumstance is hardly extraordinary¹

Petitioner also contends that unit transfers within TDCJ and the loss of his legal materials contributed to his filing delay. Although he contends he had been transferred to two different units in October 2017 and was sent to medical units for medical treatment on three other occasions, Petitioner does not specify when he was sent for medical treatment or how much time he spent in each unit, much less explain why these events precluded him from filing this § 2254 habeas petition on time. Similarly, Petitioner fails to allege specific facts regarding what legal

¹ Indeed, courts addressing this issue have almost unanimously held that delays caused by intermittent lockdowns do not constitute “extraordinary circumstances” warranting equitable tolling. *See Dodd v. United States*, 365 F.3d 1273, 1283 (11th Cir. 2004); *Sheppard v. Stephens*, No. SA-16-CA-426, 2016 WL 4276292, at *2 (W.D. Tex. May 26, 2016); *Barbour v. Prince*, No. 13-6207, 2014 WL 6901372, at *6 (E.D. La. Dec. 5, 2014) (neither the restrictions imposed while on lockdown nor reliance on legal assistance from fellow inmates constitute extraordinary circumstances); *but see Narramore v. Dir.*, No. 2:09-CV-63, 2009 WL 4884401, at *2 (E.D. Tex. Dec. 10, 2009) (lockdown is a sufficiently extraordinary circumstance that it would be unduly harsh to bar the petitioner from having his case considered on the merits because his petition was one to three days late because of the lockdown).

materials were lost or when they were lost, and he does not explain why the loss of his legal materials precluded him from filing a timely habeas petition. Accordingly, these impediments do not qualify as extraordinary circumstances warranting equitable tolling. *See Madis v. Edwards*, 347 F. App'x 106, 108 (5th Cir. 2009) (unpublished) (finding transfers between units, separation from legal materials, and administrative segregation are not rare or exceptional circumstances meriting equitable tolling).

Regardless, Petitioner fails to demonstrate that he has been pursuing his rights diligently. Although he claims that he has diligently attempted, despite TDCJ interference, to file his petition, Petitioner does not establish that his claims or supporting evidence could not have been discovered and presented earlier. 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, in his response to the 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.

Petitioner does not meet this demanding standard. Although he refers to the issues raised in the federal petition and the evidence presented to support it, Petitioner’s argument and supporting evidence do not constitute “*new reliable evidence*” establishing his innocence. Indeed, 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

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 Hector David Sanchez’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 the 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, Petitioner is **DENIED** 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 the 11 day of March, 2019.


XAVIER RODRIGUEZ
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

HECTOR DAVID SANCHEZ,
TDCJ# 02093641,

Petitioner,

v.

SA-19-CA-0059-XR (HJB)

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

SHOW CAUSE ORDER

Before the Court is *pro se* Petitioner's petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 (ECF No. 1). The Court issues this Show Cause Order to require Petitioner to address whether his petition should be dismissed as untimely.

Background

In June 2016, Petitioner plead guilty to sexual assault of a child and indecency with a child (contact) and was sentenced to twenty years of imprisonment. *State v. Sanchez*, No. 14-1183-CR-C (2nd 25th Dist. Ct., Guadalupe Cnty., Tex. June 7, 2016). Petitioner did not appeal his conviction and sentence. Petitioner did file two state habeas corpus applications challenging each of his underlying convictions on June 19, 2017, which were denied by the Texas Court of Criminal Appeals without written order on January 24, 2018. *Ex parte Sanchez*, No. 87,156-01,-02 (Tex. Crim. App.).

The instant federal habeas petition was filed on January 22, 2019. (Docket Entry 1). In the petition, Petitioner alleges: (1) he received ineffective assistance of counsel prior to pleading guilty, and (2) affidavits from his accusers establish he is actually innocent of the charges.

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). Title 28 U.S.C. § 2244(d)(1) provides “[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.” Because Petitioner is challenging his underlying guilty plea and conviction, the limitations period in this case started 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.” Section 2244(d)(1)(A); *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013). In this case, Petitioner’s conviction became final July 7, 2016, when his time for appealing his judgment and sentence expired. *See Tex. R. App. P. 26.2* (providing a notice of appeal must be filed within thirty days following the imposition of a sentence). As a result, Petitioner had until July 7, 2017, under § 2244(d) to file his federal habeas petition.

Section 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.” As discussed previously, Petitioner’s state habeas petitions were executed June 19, 2017, and later denied by the Texas Court of Criminal Appeals on January 24, 2018. Accordingly, Petitioner’s state habeas applications tolled the limitations period for 220 days, making his federal petition due on February 12, 2018. Because he did not file his § 2254 petition until January 22, 2019—almost a year after the limitations period expired—the petition appears to be barred by the one-year statute of limitations.

In his second claim for relief, Petitioner contends he is "actually innocent" based on recanting affidavits submitted by his family members, including the victim (his daughter). In *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013), 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." *Id.* at 1928 (emphasis added). It does not appear that Petitioner has made this showing in his petition or accompanying memorandum.

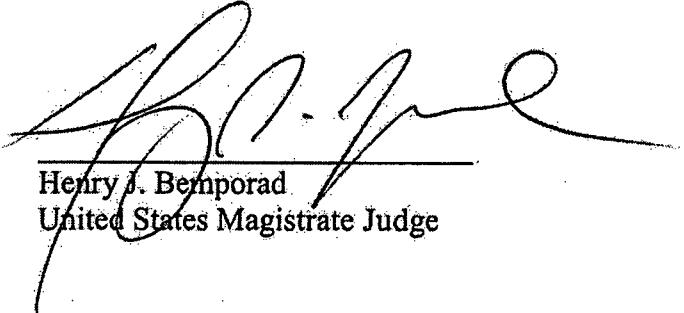
The limitations period may also, in some cases, be subject to equitable tolling. The Supreme Court has made clear, however, that a federal habeas corpus petitioner may avail himself of the doctrine of equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *McQuiggin*, 569 U.S. at 391; *Holland v. Florida*, 560 U.S. 631, 649 (2010). Again, Petitioner has not made this showing.

Conclusion

For these reasons, this Court directs Petitioner, within thirty (30) days of the filing of this Order, to SHOW CAUSE why his petition should not be dismissed as untimely. Petitioner's response must clearly and concisely demonstrate how he meets either the "actual innocence" standard under *Schlup* or the standard for applying equitable tolling, or he must provide some other reason why his § 2254 petition should not be dismissed as barred by limitations. If Petitioner fails to respond, his petition may also be dismissed for failure to prosecute and failure to comply with the Orders of this Court pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. See *Martinez v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997).

It is so ORDERED.

SIGNED on January 25, 2019.


Henry J. Bemporad
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
Southern DIVISION

PETITION FOR A WRIT OF HABEAS CORPUS BY
A PERSON IN STATE CUSTODY

Hector David Sanchez
PETITIONER
(Full name of Petitioner)

B. H. Jester 3 Unit
CURRENT PLACE OF CONFINEMENT

vs.

2093641

PRISONER ID NUMBER

Lauri Davis TDCJ Director
RESPONDENT
(Name of TDCJ Director, Warden, Jailor, or
authorized person having custody of Petitioner)

CASE NUMBER
(Supplied by the District Court Clerk)

INSTRUCTIONS - READ CAREFULLY

1. The petition must be legibly handwritten or typewritten and signed and dated by the petitioner, under penalty of perjury. Any false statement of an important fact may lead to prosecution for perjury. Answer all questions in the proper space on the form.
2. Additional pages are not allowed except in answer to questions 11 and 20. Do not cite legal authorities. Any additional arguments or facts you want to present must be in a separate memorandum. The petition, including attachments, may not exceed 20 pages.
3. Receipt of the \$5.00 filing fee or a grant of permission to proceed *in forma pauperis* must occur before the court will consider your petition.
4. If you do not have the necessary filing fee, you may ask permission to proceed *in forma pauperis*. To proceed *in forma pauperis*, (1) you must sign the declaration provided with this petition to show that you cannot prepay the fees and costs, and (2) if you are confined in TDCJ-CID, you must send in a certified *In Forma Pauperis* Data Sheet form from the institution in which you are confined. If you are in an institution other than TDCJ-CID, you must send in a certificate completed by an authorized officer at your institution certifying the amount of money you have on deposit at that institution. If you have access or have had access to enough funds to pay the filing fee, then you must pay the filing fee.

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5. Only judgments entered by one court may be challenged in a single petition. A separate petition must be filed to challenge a judgment entered by a different state court.
6. Include all of your grounds for relief and all of the facts that support each ground for relief in this petition.
7. Mail the completed petition and one copy to the U. S. District Clerk. The "Venue List" in your unit law library lists all of the federal courts in Texas, their divisions, and the addresses for the clerk's offices. The proper court will be the federal court in the division and district in which you were convicted (for example, a Dallas County conviction is in the Northern District of Texas, Dallas Division) or where you are now in custody (for example, the Huntsville units are in the Southern District of Texas, Houston Division).
8. Failure to notify the court of your change of address could result in the dismissal of your case.

PETITION

What are you challenging? (Check all that apply)

A judgment of conviction or sentence, probation or deferred-adjudication probation. (Answer Questions 1-4, 5-12 & 20-25)

A parole revocation proceeding. (Answer Questions 1-4, 13-14 & 20-25)

A disciplinary proceeding. (Answer Questions 1-4, 15-19 & 20-25)

Other: _____ (Answer Questions 1-4, 10-11 & 20-25)

All petitioners must answer questions 1-4:

Note: In answering questions 1-4, you must give information about the conviction for the sentence you are presently serving, even if you are challenging a prison disciplinary action. (Note: If you are challenging a prison disciplinary action, do not answer questions 1-4 with information about the disciplinary case. Answer these questions about the conviction for the sentence you are presently serving.) Failure to follow this instruction may result in a delay in processing your case.

1. Name and location of the court (district and county) that entered the judgment of conviction and sentence that you are presently serving or that is under attack: _____

25th District Court - Guadalupe County, Tx.

2. Date of judgment of conviction: June 7, 2016

3. Length of sentence: Two 20 year sentences running concurrent

4. Identify the docket numbers (if known) and all crimes of which you were convicted that you wish to challenge in this habeas action: Trial Court - 14-1183 CR-C

Judgment of Conviction or Sentence, Probation or Deferred-Adjudication Probation:

5. What was your plea? (Check one) Not Guilty Guilty Nolo Contendere

6. Kind of trial: (Check one) Jury Judge Only

7. Did you testify at trial? Yes No

8. Did you appeal the judgment of conviction? Yes No

9. If you did appeal, in what appellate court did you file your direct appeal? N/A

Cause Number (if known): _____

What was the result of your direct appeal (affirmed, modified or reversed)? _____

What was the date of that decision? _____

If you filed a petition for discretionary review after the decision of the court of appeals, answer the following:

Grounds raised: _____

Result: _____

Date of result: _____ Cause Number (if known): _____

If you filed a petition for a *writ of certiorari* with the United States Supreme Court, answer the following:

Result: _____

Date of result: _____

10. Other than a direct appeal, have you filed any petitions, applications or motions from this judgment in any court, state or federal? This includes any state applications for a writ of habeas corpus that you may have filed. Yes No

11. If your answer to 10 is "Yes," give the following information:

Name of court: TEXAS Court of Criminal Appeals

Nature of proceeding: Article 11.07 Writ of Habeas Corpus

Cause number (if known): WR-87-156-01 and WR-87-156-02

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court: 7-21-2017

Grounds raised: ineffective assistance of counsel

Date of final decision: 1-24-2018

What was the decision? denied without written order

Name of court that issued the final decision: TEXAS Court of Criminal Appeals

As to any second petition, application or motion, give the same information:

Name of court: motion for extension of time to file P.D.R.

Nature of proceeding: asking more time for Petition Discretionary Review

Cause number (if known): same

Date (month, day and year) you filed the petition, application or motion as shown by a file-stamped date from the particular court:

2-28-2018

Grounds raised: same plus the court added actual innocence

Date of final decision: motion filed 2-28-2018

What was the decision? PDR may not be filed from such a decision

Name of court that issued the final decision: TEXAS Court of Criminal Appeals

If you have filed more than two petitions, applications or motions, please attach an additional sheet of paper and give the same information about each petition, application or motion.

12. Do you have any future sentence to serve after you finish serving the sentence you are attacking in this petition? Yes No

(a) If your answer is "Yes," give the name and location of the court that imposed the sentence to be served in the future: _____

(b) Give the date and length of the sentence to be served in the future: _____

(c) Have you filed, or do you intend to file, any petition attacking the judgment for the sentence you must serve in the future? Yes No

Parole Revocation:

13. Date and location of your parole revocation: N/A

14. Have you filed any petitions, applications or motions in any state or federal court challenging your parole revocation? Yes No

If your answer is "Yes," complete Question 11 above regarding your parole revocation.

Disciplinary Proceedings:

15. For your original conviction, was there a finding that you used or exhibited a deadly weapon? Yes No

16. Are you eligible for release on mandatory supervision? Yes No

17. Name and location of the TDCJ Unit where you were found guilty of the disciplinary violation:

Disciplinary case number: _____

What was the nature of the disciplinary charge against you? _____

18. Date you were found guilty of the disciplinary violation: _____

Did you lose previously earned good-time days? Yes No

If your answer is "Yes," provide the exact number of previously earned good-time days that were forfeited by the disciplinary hearing officer as a result of your disciplinary hearing:

Identify all other punishment imposed, including the length of any punishment, if applicable, and any changes in custody status:

19. Did you appeal the finding of guilty through the prison or TDCJ grievance procedure? Yes No

If your answer to Question 19 is "Yes," answer the following:

Step 1 Result: _____

Date of Result: _____

Step 2 Result: _____

Date of Result: _____

All petitioners must answer the remaining questions:

20. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting them.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

A. **GROUND ONE:** Ineffective Assistance of Counsel

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Defense counsel failed to perform to a valid legal standard.

Refer to memorandum

B. **GROUND TWO:** Actual Innocence

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mature Recantations of Accusers Exonerating me

Refer to memorandum

C. **GROUND THREE:** _____

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

D. **GROUND FOUR:** _____

Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

21. Relief sought in this petition: For conviction on both charges to be reversed and vacated. Should the state still want to prosecute then for all parties to go back to their previous respective positions 'status quo ante'.

22. Have you previously filed a federal habeas petition attacking the same conviction, parole revocation or disciplinary proceeding that you are attacking in this petition? Yes No
If your answer is "Yes," give the date on which each petition was filed and the federal court in which it was filed. Also state whether the petition was (a) dismissed without prejudice, (b) dismissed with prejudice, or (c) denied.

If you previously filed a federal petition attacking the same conviction and such petition was denied or dismissed with prejudice, did you receive permission from the Fifth Circuit to file a second petition, as required by 28 U.S.C. § 2244(b)(3) and (4)? Yes No

23. Are any of the grounds listed in question 20 above presented for the first time in this petition?
 Yes No

If your answer is "Yes," state briefly what grounds are presented for the first time and give your reasons for not presenting them to any other court, either state or federal.

The TEXAS Court of Criminal Appeals gave me a
second ground of actual innocence. I did not
submit it in my 11.07 state application

24. Do you have any petition or appeal now pending (filed and not yet decided) in any court, either state or federal, for the judgment you are challenging? Yes No

If "Yes," identify each type of proceeding that is pending (i.e., direct appeal, art. 11.07 application, or federal habeas petition), the court in which each proceeding is pending, and the date each proceeding was filed.

25. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Gregory Simmons

(b) At arraignment and plea: Gregory Simmons Cathy Compton (plex)

(c) At trial: N/A

(d) At sentencing: Cathy Compton

(e) On appeal: N/A

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

Timeliness of Petition:

26. If your judgment of conviction, parole revocation or disciplinary proceeding became final over one year ago, you must explain why the one-year statute of limitations contained in 28 U.S.C. § 2244(d) does not bar your petition.¹

On October 8, 2018 I underwent total left hip replacement surgery at John Seely Correctional Hospital in Galveston. I was sent to the Pack One Unit for 3 weeks of recovery, then I was sent to Jester 3 for therapy. My property was in transit from 10/4/18 to mid Dec. 2018 till it caught up to me. From 2018 From Oct. 2017 till June 2018 I went from Green East Unit to Coffield Unit. Then in June 2018 till Oct. 2018 I was in the Hughes Unit till my operation. Each transfer separated me from my paperwork for up to 3-4 weeks each transfer.

¹ The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), as contained in 28 U.S.C. § 2244(d), provides in part that:

- (1) A one-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;
 - (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.
- (2) The 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.

Wherefore, petitioner prays that the Court grant him the relief to which he may be entitled.

N/A

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct
and that this Petition for a Writ of Habeas Corpus was placed in the prison mailing system on ~~- was not mailed~~
~~through the prison.~~
(month, day, year).

Executed (signed) on January 14, 2019 (date).

H/L D.Swif
Signature of Petitioner (required)

Petitioner's current address: B.H. Jester 3 Unit 3 Jester Rd
Richmond, TX 77406

Federal Rules of Appellate Procedure Form 7. Declaration of Inmate Filing

United States District Court for the District of WESTERN District of TEXAS

Hector David Sanchez

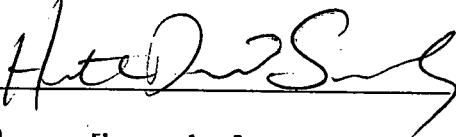
Plaintiff,)
v.)
Lauri Davis)
Director - TDCJ)
Defendant.)

Case No. _____

I am an inmate confined in an institution. Today, 1-18-19 [insert date], I am depositing the 2254 W [insert title of document; for example, "notice of appeal"] ~~in this case in the institution's internal mail system~~. First-class postage is being prepaid either by me ~~or~~ by the institution ~~on my behalf~~. HDS

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here



Signed on 1-18-19 [insert date]

[Note to inmate filers: If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).]

Cause No. WR-87,156-01, WR-87,156-02

IN the United States District Court

Western District of TEXAS - San Antonio

IN RE: Hector Sanchez

v.

Lauri Davis - Director of T.D.C.J.

Application § 2254 Writ of Habeas Corpus

Fam: 14-1183-CR-C trial court

Fam: WR-87,156-01 and WR-87,156-02

Fam: 25th District Court of
Guadalupe County, Tx.

Fam: TEXAS Court of Criminal
Appeals, Austin, Tx.

Applicant's Memorandum Brief

Evidentiary Hearing Requested

Hector Sanchez

Applicant - PRO SE

B. H. Jrstn 3 Unit

3 JESTIN Rd

Richmond, Tx. 77406

P.O.A-19-50290.17

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