United States Court of Appeals
for the Fifth Circuit

No. 21-50479

United States Court of Appeals
Fifth Circuit
FILED
July 30, 2021
Lyle W. Cayce
Clerk

JAIME LUEVANO,

Petitioner—Appellant,

versus

GREGG ABBOTT, STATE OF TEXAS ATTORNEY GENERAL; GOVERNOR RICK PERRY,

Respondents—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:10-CV-128

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of July 30, 2021, for want of prosecution. The appellant failed to timely pay docketing fee.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JAIME LUEVANO,	§	
TDCJ No. 1655791,	§	
Petitioner,	§	
	§	
v.	§	**NO. EP-10-CV-128-KC**
	§	
GREG ABBOTT,	§	
Attorney General of Texas, et al.,	§	
Respondent.	§	

MEMORANDUM OPINION

Jaime Luevano moves the Court to re-open his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Pet'r's Mot., ECF No. 6. His motion is denied for the following reasons.

BACKGROUND

In his petition, Luevano challenged his March 4, 2010 convictions for burglary of a habitation in cause numbers 20070D04788 and 20070D04789 in the 409th Judicial District Court of El Paso County, Texas. Luevano v. Abbott, EP-10-CV-128-KC, 2010 WL 1544605, at *1 (W.D. Tex. Apr. 15, 2010). He claimed "the trial court unconstitutionally selected and empaneled the jurors, the prosecution failed to disclose evidence of false statements by police officers to the jury, the State fabricated the allegations in the indictment, the State wrongfully held him in jail for six months after a mistrial, his counsel provided ineffective assistance when he forced him to testify, and the trial court deprived him of the right to represent himself." Id. He conceded "[t]his petition [was] ahead of time" and a search for his name on the Texas Court of Criminal Appeals internet site confirmed that he had not yet submitted a petition for discretionary review or an application for a writ of habeas corpus. Id. (quoting Pet'r's Pet. 13, ECF No. 1). So, it plainly appeared from the face of Luevano's petition that he "had not

presented his claims in a procedurally proper manner to the state's highest court." Id. at *2. Thus, his petition warranted dismissal for lack of exhaustion so he could pursue his state remedies and then—if he desired—return to this Court. Id.

The Court accordingly dismissed Luevano's petition without prejudice on April 15, 2010. Id.

The Eighth Court of Appeals in El Paso subsequently affirmed Luevano's convictions. See Luevano v. State, No 08-10-00154-CR, 2012 WL 1883115 (Tex. App. — El Paso May 23, 2012, pet. ref'd) (affirming the conviction for burglary of a habitation with intent to commit an aggravated sexual assault in 20070D04788); Luevano v. State, No 08-10-00159-CR, 2012 WL 1883117 (Tex. App. — El Paso May 23, 2012, pet. ref'd) (affirming the conviction for burglary of a habitation in 20070D04789).

The Court dismissed Luevano's next petition for a writ of habeas corpus without prejudice on March 26, 2014. Luevano v. Stephens, EP-14-CV-20-PRM, 2014 WL 2091362 (W.D. Tex. Mar. 26, 2014). It took this action after Luevano failed to comply with a court order to submit a completed § 2254 petition which identified his grounds for relief and to provide evidence of his indigency and support his application to proceed in forma pauperis. Id. at *1.

In his motion to reopen, Luevano claims he heard on the radio that the victim, who was nine years old at the time of the aggravated assault, "is of age now" and a gang member.[1] Pet'r's

[1] See Luevano v. State, 08-10-00154-CR, 2012 WL 1883115, at *1–2 (Tex. App.—El Paso May 23, 2012, pet. ref'd) ("In September 2007, nine-year-old A.C. lived in the home of her father along with her grandmother and uncle. ... In the early morning of September 3, 2007, A.C. awoke because she felt something licking her buttocks. ... At that point, A.C. screamed, the man ran, and A.C. went to her grandmother's room. A.C. told her grandmother that someone had broken into the house and that a man with a ponytail had licked her buttocks. ... The DPS Crime Lab ... determined that the DNA extraction from the buttocks sample contained a mixture of DNA that was consistent with DNA from both A.C. and Appellant.")

Mot. He also maintains federal district courts have misapplied the Antiterrorism and Effective Death Penalty Act's three strikes rule to him.[2]

APPLICABLE LAW

Rule 60(b) of the Federal Rules of Civil Procedure provides a court may grant a party relief from a judgment or order in limited circumstances:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Such a motion must be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. Gonzalez v. Crosby, 545 U.S. 524, 528 n. 2 (2005).

ANALYSIS

[2] While incarcerated, Luevano has filed at least three civil actions that resulted in strikes after they were dismissed as frivolous, malicious, or for failure to state a claim. See Luevano v. Boykin, No. 5:08–CV–1844 (N.D. Ohio Oct. 31, 2008) (dismissing complaint for failure to state a claim); Luevano v. Richardson, No. 1:08–CV–781 (D.N.M. Oct. 1, 2008) (dismissing complaint for failure to state a claim); Luevano v. Clinton, No. 2:08–CV–1360 (E.D.N.Y. Apr. 4, 2008) (dismissing complaint as frivolous); Luevano v. Bd. of Disciplinary App., No. 5:08–CV–0107 (W.D. Tex. Mar. 20, 2008) (dismissing complaint as frivolous); Luevano v. Doe, No. 1:07–CV–1025 (W.D. Tex. Jan. 18, 2008) (dismissing complaint as frivolous); Luevano v. Perry, No. 1:07–CV–1026 (W.D. Tex. Jan. 18, 2008) (dismissing complaint as frivolous); Luevano v. U.S. President of Am., No. 08–CV–0053 (D.D.C. Jan. 2, 2008) (dismissing complaint for failure to state a claim).

Luevano's federal habeas petition was dismissed on April 15, 2010. Luevano, 2010 WL 1544605. He dated and presumably placed his motion to reopen his case in the prison mail system more than eleven years later, on April 26, 2021. See Spotville v. Cain, 149 F.3d 374, 378 (5th Cir. 1998) (holding § 2254 applications are deemed filed on date the inmate tenders the petition to prison officials for mailing). Because Luevano did not file his instant motion within a year after the entry of the final judgment, he could not pursue relief under reasons (1), (2) or (3) of Rule 60(b). Fed. R. Civ. P. 60(c)(1).

Further, the final judgment in Luevano's case was neither voided nor satisfied, released, discharged, reversed or otherwise vacated. Consequently, he also could not obtain relief under reasons (4) or (5) of Rule 60(b).

Finally, "[w]hile Rule 60(b)(6) is commonly referred to as a grand reservoir of equitable power to do justice, the rule is only invoked in extraordinary circumstances." Rocha v. Thaler, 619 F.3d 387, 400 (5th Cir. 2010) (quotation marks and citations omitted); see also Gonzalez, 545 U.S. at 535 ("[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment.") (quoting Ackermann v. United States, 340 U.S. 193, 199 (1950)). "Such circumstances will rarely occur in the habeas context." Gonzalez, 545 U.S. at 535.

The fact that Luevano's victim—a child at the time of the assault—is now an adult is clearly not an extraordinary circumstance—and not relevant to the resolution of his state criminal cases through a habeas petition. The fact that Luevano may have received multiple strikes for filing civil lawsuits—later dismissed because they were frivolous, malicious or failed to state a claim—is also not an extraordinary circumstance or relevant to the resolution of his state criminal cases. Carson v. Johnson, 112 F.3d 818, 820 (5th Cir. 1997) ("applying the three strikes

provision to habeas petitions 'would be contrary to a long tradition of ready access of prisoners to federal habeas corpus.'") (quoting United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996)). Furthermore, it is simply not reasonable for a petitioner to wait eleven years before filing a motion for relief from a judgment.

CONCLUSIONS

The Court declines to revisit Luevano's petition for a writ of habeas corpus—dismissed over a decade ago—to give him another "bite at the apple." ABC Utilities Services Inc. v. Orix Fin. Services Inc., 98 F. App'x 992, 994 n.12 (5th Cir. 2004). Consequently, the Court will not grant Luevano's motion, re-open his cause or consider his petition for a writ of habeas corpus. Accordingly, the Court **DENIES** Luevano's "Motion Emergency to Reopen Cases in Gen." (ECF No. 6). The Court additionally **DENIES** Luevano a certificate of appealability because jurists of reason would not find it debatable whether the Court was correct in its rulings. The Court also **DENIES** all pending motions, if any. The Court finally directs the District Clerk to **CLOSE** this case.

SIGNED this 4th day of May, 2021.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JAIME LUEVANO,	§	
TDCJ No. 9340134,	§	
Petitioner,	§	
	§	
v.	§	**EP-10-CV-128-KC**
	§	
GREG ABBOTT, Attorney General	§	
of Texas, *et al.*,	§	
Respondents.		

MEMORANDUM OPINION AND ORDER

Before the Court is Petitioner Jaime Luevano's *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Therein, Luevano challenges two state-court convictions. After reviewing the available records, the Court concludes that it should dismiss Luevano's petition without prejudice because he has not exhausted all remedies available in the state system. The Court additionally concludes that it should deny Luevano a certificate of appealability.

BACKGROUND AND PROCEDURAL HISTORY

Luevano asserts he is currently in state custody as the result of two convictions in 2010 for burglary of a habitation.[1] Luevano reports he received life and twenty-five-year prison sentences in these cases from the 409th Judicial District Court of El Paso County, Texas.

The Court has liberally read Luevano's petition.[2] The Court understands him to claim the trial court unconstitutionally selected and empaneled the jurors, the prosecution failed to disclose evidence of false statements by police officers to the jury, the State fabricated the allegations in

[1] *State v. Luevano*, Cause Nos. 20070D04788, 20070D04789 (409th Dist. Ct., El Paso County, Tex. Mar. 4 2010).

[2] *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (holding *pro se* pleadings to less stringent standards than formal pleadings drafted by lawyers); *see also Franklin v. Rose*, 765 F.2d 82, 85 (6th Cir. 1985) (explaining liberal construction allows active interpretation of a *pro se* pleading to encompass any allegation which may raise a claim for federal relief).

the indictment, the State wrongfully held him in jail for six months after a mistrial, his counsel provided ineffective assistance when he forced him to testify, and the trial court deprived him of the right to represent himself. Luevano concedes "[t]his petition is ahead of time, in advance of time–and–to beyond the future . . . proceedings."[3] A review of court records maintained by the Texas Court of Criminal Appeals on its web site[4] confirms that Luevano has not submitted a petition for discretionary review or state application for a writ of habeas corpus challenging these convictions.[5]

LEGAL STANDARD

Section 2254 allows a district court to "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[6] As a prerequisite to obtaining § 2254 relief, however, a prisoner must exhaust all remedies available in the state system.[7] This exhaustion requirement reflects a policy of federal-state comity "designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights.'"[8] It also prevents "unnecessary conflict between

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[3] Pet. 13 of 16 [Docket No. 1].

[4] *See* http://www.cca.courts.state.tx.us/opinions.

[5] Luevano has, however, filed three original writs of mandamus related to these cases. *In re Luevano*, WR-58,920-03 (Tex. Crim. App. Jan 16, 2008); *In re Luevano*, WR-58,920-04 (Tex. Crim. App. Oct. 22, 2008); *In re Luevano*, WR-58,920-05 (Tex. Crim. App. Jan 13, 2010).

[6] 28 U.S.C.A. § 2254(a) (West 2010).

[7] 28 U.S.C. § 2254(b)(1), (c); *Fisher v. Texas*, 169 F.3d 295, 302 (5th Cir. 1999).

[8] *Picard v. Connor*, 404 U.S. 270, 275 (1971) (quoting *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971)).

courts equally bound to guard and protect rights secured by the Constitution."[9]

A petitioner satisfies the exhaustion requirement when he presents the substance of his habeas claims to the state's highest court in a procedurally proper manner before filing a petition in federal court.[10] In Texas, the Court of Criminal Appeals is the highest court for criminal matters.[11] Thus, a Texas prisoner may satisfy the exhaustion requirement only by presenting both the factual and legal substance of his claims to the Texas Court of Criminal Appeals in either a petition for discretionary review or a state habeas corpus proceeding pursuant to Texas Code of Criminal Procedure article 11.07.[12]

ANALYSIS

The rules governing § 2254 cases instruct federal district courts to screen petitions.[13] "If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.[14]

In the instant case, Luevano's petition clearly shows that he has not presented his claims in a procedurally proper manner to the state's highest court.[15] Thus, he has not "exhausted the

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[9] *Ex Parte Royall,* 117 U.S. 241, 251 (1886).

[10] *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Morris v. Dretke*, 379 F.3d 199, 204 (5th Cir. 2004).

[11] *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985).

[12] TEX. CRIM. PROC. CODE ANN. art. 11.07 (Vernon 2003 & Supp. 2008); *Tigner v. Cockrell*, 264 F.3d 521, 526 (5th Cir. 2001); *Alexander v. Johnson*, 163 F.3d 906, 908-09 (5th Cir. 1998).

[13] U.S.C.S. § 2254 PROC. R. 4 (West 2010).

[14] *Id.*

[15] Pet. 3 of 9 [Docket No. 2]; *see* TEX. CRIM. PROC. CODE ANN. art. 11.07, § 3(a) ("[T]he writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.").

remedies available in the courts of the State."[16] Further, he still "has the right under the law of the State to raise . . . the question[s] presented."[17] Thus, it is plain from the face of Luevano's petition that he has not satisfied the preconditions for review set forth in § 2254. Dismissal of his petition for lack of exhaustion is therefore warranted so that he may fully pursue his state remedies and then return to this Court, if he so desires.

CERTIFICATE OF APPEALABILITY

A petitioner may not appeal a final order in a habeas corpus proceeding "[u]nless a circuit justice or judge issues a certificate of appealability."[18] Further, appellate review of a habeas petition is limited to the issues on which a certificate of appealability is granted.[19] In other words, a certificate of appealability is granted or denied on an issue-by-issue basis, thereby limiting appellate review solely to those issues on which a certificate of appealability is granted.[20] Although Luevano has not yet filed a notice of appeal, this Court nonetheless must address whether he is entitled to a certificate of appealability.[21]

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[16] 28 U.S.C. § 2254(b)(1)(A).

[17] 28 U.S.C. § 2254(c).

[18] 28 U.S.C.A. § 2253(c)(1)(B) (West 2010).

[19] *See Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997) (holding that, in regard to the denial of relief in habeas corpus actions, the scope of appellate review is limited to the issues on which a certificate of appealability is granted).

[20] *See* 28 U.S.C.A. §2253(c)(3) (setting forth the narrow scope of appellate review in habeas corpus matters); *see also Lackey*, 116 F.3d at 151 (holding that a certificate of appealability is granted on an issue-by-issue basis, thereby limiting appellate review to those issues); *but see United States v. Kimler*, 150 F.3d 429, 431 & 431 n.1 (5th Cir. 1998) (explaining the Fifth Circuit may address an issue not certified by the district court if the movant makes (1) an explicit request, and (2) a substantial showing of the denial of a constitutional right).

[21] *See* U.S.C.S. § 2254 PROC. R. 11(a) (West 2010) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."); *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (explaining it is appropriate for a district court to address *sua sponte* the issue of whether it should grant or deny a certificate of appealability, even before one is requested).

A certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."[22] In cases where a district court rejects a petitioner's constitutional claims on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[23] To warrant a grant of the certificate as to claims that the district court rejects solely on procedural grounds, the petitioner must show both that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[24] Because the exhaustion prerequisite to federal habeas corpus review is well established, the Court concludes that jurists of reason would not debate whether the procedural ruling in this case is correct. Accordingly, the Court finds it should deny Luevano a certificate of appealability.

CONCLUSION

For the reasons discussed above, the Court concludes that Luevano is not entitled to federal habeas corpus relief at this time. Accordingly, the Court enters the following orders:

1. The Court **DISMISSES WITHOUT PREJUDICE** Petitioner Jaime Luevano's *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 for failure to exhaust his state remedies.
2. The Court **DENIES** Petitioner Jaime Lueverno a **CERTIFICATE OF APPEALABILITY**.

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[22] 28 U.S.C.A. § 2253(c)(2).

[23] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

[24] *Id.*

3. The Court **DENIES AS MOOT** all pending motions in this cause, if any.

SO ORDERED.

SIGNED this 16th day of April 2010.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE