

FILED

United States Court of Appeals
for the Fifth Circuit

No. 20-50898

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

DEPUTY CLERK

United States Court of Appeals
Fifth Circuit

FILED

June 29, 2021

Lyle W. Cayce
Clerk*Petitioner—Appellant,**versus*

THE STATE OF TEXAS,

*Respondent—Appellee.*Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:20-CV-931 - FB

ORDER:

IT IS ORDERED that Appellant's motion for a certificate of appealability is DENIED.

IT IS FURTHER ORDERED that Appellant's motion for inquisition regarding the certificate of appealability requirement is DENIED as moot.

/s/ James E. Graves, Jr.

JAMES E. GRAVES
United States Circuit Judge

Appendix A

Certified as a true copy and issued
as the mandate on Aug 11, 2021Attest: *Lyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KIRK WAYNE MCBRIDE, SR.,
TDCJ# 00733097

¶ ¶ ¶ ¶ ¶

Petitioner,

88

§

8

3

38

۲۰۸

8

VS

CIVIL ACTION NO. SA-20-CV-931-FB

THE STATE OF TEXAS.

8

3
8

8

2

23

Respondent.

ORDER OF DISMISSAL

Before the Court is Petitioner, Kirk Wayne McBride Sr.’s (Petitioner” or “Mr. McBride”) Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2241 (“Section 2241 Petition”). Upon consideration, the Section 2241 Petition is **DISMISSED**. (ECF No. 1).

BACKGROUND

In 1995, Kirk Wayne McBride, Sr. was convicted of aggravated sexual assault and sentenced to a term of ninety-nine (99) years; he is presently incarcerated at the Wynne Facility in Huntsville, Texas. *See* <https://offender.tdcj.texas.gov/OffenderSearch/offenderDetail.action?sid=02533483> (last visited September 28, 2020). Mr. McBride was incarcerated for this offense until November 5, 2014, when he was released from the custody of the Texas Department of Criminal Justice (“TDCJ”) to parole supervision. *McBride v. Davis*, No. SA:18-CV-831-DAE (W.D. Tex.) (executed on August 7, 2018, and dismissed as successive on October 4, 2019) (ECF No. 15-1 at 3, 14). Mr. McBride remained on parole until February 15, 2017, when a pre-revocation warrant of arrest was issued due to a urinalysis revealing the presence of amphetamines. *Id.*, (ECF No. 12-19 at 4). A parole revocation hearing was held on March 2, 2017, at which the Board of Pardons and Paroles (“BPP”)

decided to place Mr. McBride in an Intermediate Sanction Facility (“ISF”) instead of revoking his parole. *Id.* In June of 2017, Mr. McBride was released from the ISF to parole. *Id.*, (ECF No. 15-1 at 3).

However, due to Mr. McBride’s continued drug use, another pre-revocation warrant of arrest was issued several weeks later. *Id.*, (ECF No. 15-1 at 3-4, 21-25). The BPP held a parole revocation hearing on July 28, 2017, and decided to revoke Mr. McBride’s parole based on his drug use and failure to participate in a substance abuse treatment program. *Id.* (ECF No. 15-1 at 3-5, 24-37).

Since his conviction, Mr. McBride has filed six habeas actions, including the present case, in the Western District of Texas: *McBride v. Davis*, No. SA:19-CV-1353-FB (W.D. Tex.) (executed on November 12, 2019, and dismissed on November 25, 2019) (habeas case challenging the constitutionality of petitioner’s September 1995 state court conviction and ninety-nine year sentence for aggravated sexual assault in Case No. CR95-129); *McBride v. Davis*, No. SA:18-CV-831-DAE (habeas case pertaining challenging petitioner’s parole revocation in Case No. CR95-129); *McBride v. Davis*, No. SA:17-CV-1262-FB (W.D. Tex.) (executed on December 4, 2017, and denied on July 26, 2018) (habeas case challenging petitioner’s parole revocation in Case No. CR95-129); *McBride v. Davis*, No. SA:17-CV-982-DAE (W.D. Tex.) (executed on September 2, 2017, and dismissed without prejudice on October 6, 2017) (habeas case challenging petitioner’s September 5, 2005, state court conviction and ninety-nine year sentence for aggravated sexual assault in Case No. CR95-129); and *McBride v. Johnson*, No. SA:99-CV-1246-WRF (habeas action filed on November 1, 1999, and denied on August 24, 2000).¹

¹ Additionally, petitioner has filed cases in the Southern and Eastern Districts as well.

In his most recent habeas action, executed on July 21, 2020, Mr. McBride appears to contend that in addition to his September 8, 1995, conviction for aggravated sexual assault in Case No. CR95-129, he was also convicted of aggravated sexual assault on April 11, 1995, in Case No. CR94-311 and sentenced to sixty (60) years. (ECF No. 1 at 8). Petitioner maintains the State of Texas has refused to enter a written judgment and order of conviction in Case No. CR94-311 and seeks an order directing the State of Texas to “render a written Judgment [in Case No. CR94-311] so that the sentence can be carried into execution and . . . calculated and time served assessed against the sentence.” (*Id.*).

Of relevance to the Court’s discourse is the following excerpt taken from the Court of Appeals’ opinion in *McBride v. Texas*, No. 03-95-00596-CR, 1997 Tex. App. LEXIS 1284, at *1–4 (Tex. App.—Austin Mar. 20, 1997, pet. ref’d) (not designated for publication):

On the night in question, the complainant met appellant at a party and agreed to give him a ride to his house, which he told her was a short distance away. Appellant directed the complainant to a house on Michigan Street in New Braunfels. After the complainant stopped, appellant produced a ten-inch knife which he held to her neck and head. The complainant attempted to escape, but she fell to the ground. During this struggle, the complainant cut her hand on appellant’s knife. Appellant ripped the complainant’s shirt and bra, and removed her pants and underwear. When the complainant tried to scream, appellant choked her. Appellant also “started repeatedly [sic] stabbing at [the complainant], like pretend stabbing . . . all across [her] face and [her] shoulders.” He then raped her vaginally and anally. The complainant again attempted to escape, but appellant struck her on the head, gained control of her car, and drove her to a rural location on Schwab Road. During this drive, appellant appeared to be in a “frenzy.” At the Schwab Road location, appellant again penetrated the complainant vaginally and anally, and performed cunnilingus. He then drove the complainant back to the scene of the original assault to recover his knife, which he had dropped. After finding the knife, appellant returned to Schwab Road where he raped the complainant vaginally and anally a third time. Appellant then drove back to New Braunfels and stopped outside a house in which he said his friends lived. He told the complainant that if he was arrested, these friends would kill her. Appellant then returned to the Schwab Road location, where he again penetrated the complainant vaginally. Finally, approximately four hours after the first assault, appellant drove the complainant’s car to New Braunfels, got out, and walked away. The complainant immediately sought out the police and reported what had happened to her.

This incident gave rise to four indictments for sexual assault (Comal County cause number CR90-029), aggravated sexual assault (CR90-157 and CR90-158), and aggravated kidnapping (CR90-159). Appellant was convicted on each indictment following a consolidated trial, but the convictions were reversed by this Court. *McBride v. State*, 840 S.W.2d 111 (Tex. App.--Austin 1992, pet. ref'd). Appellant's retrial on the original indictments resulted in a mistrial on appellant's motion. Thereafter, appellant was twice reindicted, with cause number CR90-157 becoming cause number CR94-311 and then cause number CR95-129. The latter indictment, on which the present conviction is based, alleged the primary offense in two counts: (1) sexual assault aggravated by fear of imminent infliction of death, serious bodily injury, and kidnapping; and (2) sexual assault aggravated by the use of a deadly weapon. PENAL CODE § 22.021(a)(2)(A)(ii) & (iv). The court's jury charge authorized appellant's conviction on either theory and the jury returned a general verdict of guilty.

Id.

As the foregoing opinion excerpt indicates, Case No. CR94-311 was subsequently reindicted as Case No. CR95-129, which resulted in petitioner's conviction and ninety-nine year sentence. Therefore, there is no outstanding Judgment and Order of Conviction in Case No. CR94-311. Consequently, petitioner's request for an order directing the State of Texas to "render a written Judgment [in Case No. CR94-311] so that the sentence can be carried into execution and . . . calculated and time served assessed against the sentence" is **DISMISSED**. (ECF No. 1).

Given the fact that Case No. CR94-311 was reindicted in Case No. CR95-129, the Court concludes petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling."² *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the Court **DENIES** a certificate of appealability. *See Stringer v.*

² Petitioner previously filed a number of habeas actions challenging his conviction and sentence in Case No. CR95-129, including the following two cases in this District alone: *McBride v. Davis*, No. SA:19-CV-1353-FB; *McBride v. Davis*, No. SA:17-CV-982-DAE. In fact, due to petitioner's numerous frivolous filings following this judgment, the Court barred petitioner from filing anything "challenging or even mentioning his aggravated sexual assault conviction . . . unless that filing is accompanied by an order from the Fifth Circuit Court of Appeals authorizing the filing." *See McBride, Sr. v. Johnson*, No. SA:99-CV-01246-WRF. Petitioner's current filing does not meet this requirement.

Williams, 161 F.3d 259, 262 (5th Cir. 1998) (requiring state pre-trial detainee challenging criminal charges pending against him to obtain a certificate of appealability following district court's denial of petition under 28 U.S.C. § 2241).

Accordingly, **IT IS HEREBY ORDERED** that the Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241 filed by Petitioner Kirk Wayne McBride, Jr. is **DISMISSED**. (ECF No. 1).

IT IS FURTHER ORDERED that a Certificate of Appealability is **DENIED**, and this case is now **CLOSED**. Motions pending, if any, are also **DISMISSED**.

It is so ORDERED.

SIGNED this 28th day of September, 2020.



FRED BIERY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KIRK WAYNE MCBRIDE, SR.,
TDCJ# 00733097

§

§

§

Petitioner,

§

§

VS

CIVIL ACTION NO. SA-20-CV-931-FB

§

§

§

THE STATE OF TEXAS,

§

§

Respondent.

§

JUDGMENT

The Court considered the Judgment to be entered in the above styled and numbered cause.

Pursuant to the Order of Dismissal of even date herewith dismissing Petitioner, Kirk Wayne McBride Sr.'s Writ of Habeas Corpus Under 28 U.S.C. § 2241, and further, denying a Certificate of Appealability,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241 is **DISMISSED**.

IT IS FURTHER ORDERED that a Certificate of Appealability will not issue in this case, and this case is now **CLOSED**.

It is so ORDERED.

SIGNED this 28th day of September, 2020.



FRED BIERY
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 20-50898

KIRK WAYNE McBRIDE, SR.,

Petitioner—Appellant,

versus

THE STATE OF TEXAS,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:20-CV-931

Before DENNIS, SOUTHWICK, and GRAVES, *Circuit Judges.*

PER CURIAM:

A member of this panel previously DENIED a motion for Certificate of Appealability. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.