

United States Court of Appeals
for the Fifth Circuit

No. 20-60758

ERIC DENORRIS KENNEDY,

Petitioner—Appellant,

versus

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF
CORRECTIONS,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:20-CV-78

Before STEWART, HAYNES, and HO, *Circuit Judges.*

PER CURIAM:

This panel previously DISMISSED the appeal for lack of jurisdiction, and the motions for a COA and to proceed in forma pauperis were DENIED AS MOOT. The panel has considered Appellant's motion for reconsideration. The panel hereby corrects its prior order to reflect that the appeal date was August 17, 2020, not 2021. However, because the appeal referenced solely the district court's order dated March 2, 2020, it was still untimely.

IT IS ORDERED that the motion is DENIED.

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FILED

August 12, 2021

Lyle W. Cayce
Clerk

ERIC DENORRIS KENNEDY,

Petitioner—Appellant,

versus

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF
CORRECTIONS,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Southern District of Mississippi
USDC No. 3:20-CV-78

Before STEWART, HAYNES, and HO, *Circuit Judges.*

PER CURIAM:

In 1998, Eric Denorris Kennedy was convicted of murder in Mississippi state court and sentenced to life imprisonment. In 2010, Kennedy filed a petition under 28 U.S.C. § 2254 in federal district court. The district court dismissed his petition as time barred, and we denied Kennedy's motion for a certificate of appealability ("COA").

Kennedy filed the present § 2254 petition in 2020. The district court determined that this petition was "second or successive" within the meaning

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of 28 U.S.C. § 2244(b)(3)(A), which requires a petitioner to obtain the permission of the appropriate court of appeals before filing such a petition. Because Kennedy had not obtained permission from a court of appeals, the district court, by order dated March 2, 2020, concluded that it lacked jurisdiction over the petition, and accordingly transferred the case to us under 28 U.S.C. § 1631 to determine whether to grant permission to file a successive petition. On June 3, 2020, we entered an order denying Kennedy's motion for authorization to file a successive petition. Kennedy filed a notice of appeal on August 17, 2021, seeking to appeal the district court's March 2, 2020 order transferring the case to us. He now seeks a COA.

A petitioner does not need a COA to appeal an order transferring a successive habeas petition to a court of appeals, so that motion is unnecessary. *United States v. Fulton*, 780 F.3d 683, 686–88 (5th Cir. 2015); see also *Scott v. Texas*, 803 F. App'x 812, 812–13 (5th Cir. 2020) (per curiam) (applying *Fulton* in a § 2254 case). However, his underlying notice of appeal was untimely. See 28 U.S.C. § 2107 (requiring the notice of appeal to be filed within thirty days of the judgment being appealed). When set by statute, the time limitation for filing a notice of appeal in a civil case is jurisdictional. *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017).

Accordingly, we DISMISS this appeal for lack of jurisdiction. Kennedy's motions for a COA and to proceed in forma pauperis are DENIED AS MOOT.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-60164



In re: ERIC DENORRIS KENNEDY,

Movant

A True Copy
Certified order issued Jun 03, 2020

Steph W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

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

Before SMITH, DENNIS, and DUNCAN, Circuit Judges.

PER CURIAM:

Eric Denorris Kennedy, Mississippi prisoner # T0146, moves this court for authorization to file a successive 28 U.S.C. § 2254 application, challenging his 1998 murder conviction and resulting life sentence. This court may authorize the filing of a successive § 2254 application with respect to a claim that was not presented in a prior habeas corpus application only if the applicant makes a prima facie showing that (1) "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and that, "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder

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would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(A), (b)(2)(B), (b)(3)(C).

In his proposed successive § 2254 application, Kennedy seeks to raise the following claims: (1) he is actually innocent, (2) his sentence is illegal because the state statutes under which it was imposed are unconstitutionally vague, (3) his guilty plea was unknowing and involuntary, (4) the state courts committed numerous errors in connection with his post-conviction proceedings, (5) the prosecution suppressed favorable evidence, in violation of *Brady*,¹ and (6) counsel was ineffective. He contends that his sentencing claim relies on a new, retroactively applicable rule of constitutional law, citing *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Inasmuch as Kennedy seeks to raise the claim that his guilty plea is invalid, the claim was presented in his first § 2254 application and is thus barred. See § 2244(b)(1). Even were that not so, and as to the remaining proposed claims, Kennedy fails to make the required prima facie showing. Specifically, Kennedy has not made a prima facie showing that *Johnson* is applicable to his case. See 135 S. Ct. at 2555-57; § 2244(b)(2)(A).

Regarding Kennedy’s claim of actual innocence, this court does not recognize freestanding claims of actual innocence in § 2254 proceedings. See *Floyd v. Vannoy*, 894 F.3d 143, 155 (5th Cir.), cert. denied, 139 S. Ct. 573 (2018). While a showing of actual innocence may serve as a gateway for consideration of claims in an applicant’s first § 2254 application that otherwise would be procedurally barred or untimely, see *McQuiggin v. Perkins*, 569 U.S. 383, 391-95 (2013); *House v. Bell*, 547 U.S. 518, 536-37 (2006), there is no indication, given § 2244(b)(2)(B)’s requirements for filing a successive § 2254 application, that the exception for claims of actual innocence applies to the

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

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successive bar. *See Perkins*, 569 U.S. at 396-97. Moreover, even if such an exception to the filing requirements of § 2244(b) exists, Kennedy does not show that there is new evidence and that “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see Perkins*, 569 U.S. at 396-99.

Accordingly, IT IS ORDERED that the motion for authorization is DENIED.

**Additional material
from this filing is
available in the
Clerk's Office.**