APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 21-50177

United States Court of Appeals
Fifth Circuit
FILED
November 18, 2021
Lyle W. Cayce
Clerk

THOMAS JOHNNY WILKINS,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director,*
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent—Appellee.

Application for Certificate of Appealability from
the United States District Court
for the Western District of Texas
No. 6:20-CV-1109

ORDER:

Thomas Wilkins, Texas prisoner #02074591, was convicted by a jury of two counts of aggravated sexual assault of a child and one count of indecency with a child. He seeks a certificate of appealability ("COA") to appeal the dismissal of his 28 U.S.C. § 2254 petition as time-barred.

Wilkins contends that the district court erred because he made a substantial showing of the denial of a constitutional right. He also moves to amend his COA application to include certain medical records to support his claim of actual innocence to overcome the time bar.

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No. 21-50177

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Where, as here, a § 2254 application is dismissed on procedural grounds without reaching the prisoner's underlying constitutional claim, "a COA should issue when the prisoner shows, at least, 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Wilkins fails to make the required showing. Further, this court ordinarily will not consider evidence not before the district court. In any event, the medical records do not satisfy Wilkins's burden.

The motion for a COA and the motion to amend the COA application are therefore DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

Certified as a true copy and issued as the mandate on Dec 10, 2021

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

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United States Court of Appeals for the Fifth Circuit

No. 21-50177

THOMAS JOHNNY WILKINS,

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 Western District of Texas
No. 6:20-CV-1109

O R D E R:

IT IS ORDERED that appellant's motion for an extension of time to file a motion for reconsideration is DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

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United States Court of Appeals for the Fifth Circuit

No. 21-50177

THOMAS JOHNNY WILKINS,

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 Western District of Texas
USDC No. 6:20-CV-1109

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:

A member of this panel denied appellant's motion for an extension of time to file a petition for rehearing/reconsideration. Appellant's motion for reconsideration is DENIED.

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

THOMAS JOHNNY WILKINS	§	
#2074591	§	
	§	
V.	§	**W-20-CA-1109-ADA**
	§	
BOBBY LUMPKIN	§	

ORDER

Before the Court is Petitioner's application for habeas corpus relief. Petitioner's application appears to be barred by the one-year statute of limitations. The AEDPA provides for a one-year limitation period during which a state prisoner may seek federal habeas review of his judgment of conviction, running, in this case, 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); *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013).

Petitioner indicates he was convicted on June 22, 2016. He appealed, and his conviction was affirmed on February 28, 2018. Petitioner's petition for discretionary review was refused by the Texas Court of Criminal Appeals on May 23, 2018. Therefore, his conviction became final, at the latest, on August 21, 2018. Therefore, Petitioner had until August 21, 2019, to timely file his federal application. Petitioner did not execute his

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federal application for habeas corpus relief until November 30, 2020, over a year after the limitations period had expired.

Petitioner's state application for habeas corpus, filed on April 3, 2020, did not operate to toll the limitations period, because it was filed after the limitations period had already expired. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (state application for habeas corpus relief filed after limitations period expired does not toll the limitations period).

Petitioner may be arguing that he is entitled to equitable tolling. "[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Petitioner also may be arguing that the untimeliness of his application should be excused because he is actually innocent. In *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), the Supreme Court held 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). A habeas petitioner, who seeks to surmount a procedural default through a showing of "actual innocence," must support his allegations with "new, reliable evidence" that was not presented at trial and must show that it was more likely than not that, in light of the new evidence, no juror, acting reasonably, would have voted to find the petitioner guilty beyond a reasonable doubt. *See Schlup*, 513 U.S. at 326–27 (1995).

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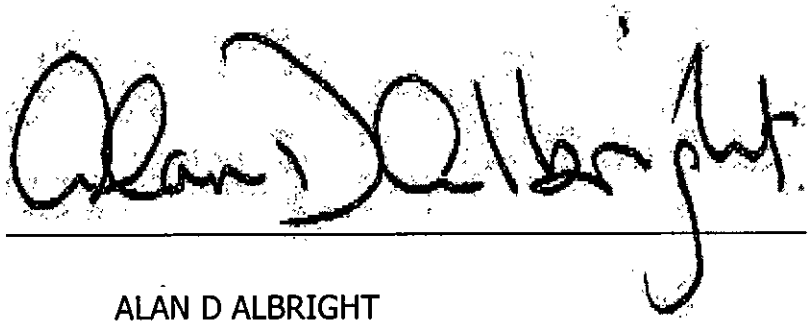
As Petitioner is proceeding pro se, the Court will provide him an opportunity to explain any reason why his application should not be dismissed as untimely.

Accordingly, it is hereby **ORDERED** that Petitioner shall, on or before **January 6, 2021,** show cause why his habeas corpus application should not be dismissed as time-barred. Failure to respond to this Order will result in the dismissal of Petitioner's application for habeas corpus relief.

SIGNED on December 7, 2020



ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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

THOMAS JOHNNY WILKINS	§	
#2074591	§	
	§	
V.	§	**W-20-CA-1109-ADA**
	§	
BOBBY LUMPKIN	§	

ORDER

Before the Court is Petitioner's Petition For a Writ of Habeas Corpus by a Person in State Custody. Petitioner is proceeding pro se and has paid the filing fee. For the reasons set forth below, Petitioner's application for writ of habeas corpus is dismissed with prejudice as time-barred.

Procedural History

Petitioner indicates he was convicted on June 22, 2016. He appealed, and his conviction was affirmed on February 28, 2018. Petitioner's petition for discretionary review was refused by the Texas Court of Criminal Appeals on May 23, 2018. Petitioner filed a state application for habeas relief on April 3, 2020, that was denied on September 16, 2020. Petitioner signed his federal habeas application on November 30, 2020.

DISCUSSION

Petitioner's application is barred by the one-year statute of limitations. Federal law establishes a one-year statute of limitations for state inmates seeking federal habeas corpus relief. *See* 28 U.S.C. § 2244(d). That section provides, in relevant part:

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(d)(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;

(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.

Petitioner's conviction became final, at the latest, on August 21, 2018. Therefore, Petitioner had until August 21, 2019, to timely file his federal application. Petitioner did not execute his federal application for habeas corpus relief until November 30, 2020, over a year after the limitations period had expired.

Petitioner's state application for habeas corpus, filed on April 3, 2020, did not operate to toll the limitations period because it was filed after the limitations period had already expired. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (state application for habeas corpus relief filed after limitations period expired does not toll the limitations period). Thus, Petitioner's application is time-barred.

Petitioner appears to be contending he is eligible for equitable tolling. "[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that

he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Although the Fifth Circuit has permitted equitable tolling in certain cases, it requires a finding of "exceptional circumstances." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998) (finding "exceptional circumstances" in a case in which the trial court considering the petitioner's application under Section 2254 granted the petitioner several extensions of time past the AEDPA statute of limitations). The Fifth Circuit has consistently found no exceptional circumstances in other cases where petitioners faced non-routine logistical hurdles in submitting timely habeas applications. *See e.g. Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (proceeding pro se is not a "rare and exceptional" circumstance because it is typical of those bringing a § 2254 claim). As the Fifth Circuit has pointed out, "Congress knew AEDPA would affect incarcerated individuals with limited access to outside information, yet it failed to provide any tolling based on possible delays in notice." *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999). The Fifth Circuit explained that equitable tolling "applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights," and noted that "excusable neglect" does not support equitable tolling. *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (quoting *Rashidi v. America President Lines,* 96 F.3d 124, 128 (5th Cir. 1996)).

Petitioner asserts that he was diligent, but did not understand the law and was relying on other inmates to assist him. Because other inmates needed medical treatment, it hampered Petitioner's ability to timely file. Furthermore, Petitioner argues

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the timeliness standard cannot be applied to cases concerning claims of ineffective assistance of counsel. This is not the law and the cases cited on this issue by Petitioner do not support his argument. Unfortunately for Petitioner, even assuming that his reliance on other inmates led to a delay in filing, a lack of familiarity with the legal process or lack of legal assistance during the filing period does not merit equitable tolling. *See Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999).

Petitioner also appears to be contending that the untimeliness of his application should be excused because he is actually innocent. In *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), the Supreme Court held 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). A habeas petitioner, who seeks to surmount a procedural default through a showing of "actual innocence," must support his allegations with "new, reliable evidence" that was not presented at trial and must show that it was more likely than not that, in light of the new evidence, no juror, acting reasonably, would have voted to find the petitioner guilty beyond a reasonable doubt. *See Schlup*, 513 U.S. at 326–27 (1995); *see also House v. Bell*, 547 U.S. 518 (2006) (discussing at length the evidence presented by the petitioner in support of an actual-innocence exception to the doctrine of procedural default under *Schlup*). "Actual innocence" in this context refers to factual innocence and not mere legal sufficiency. *Bousely v. United States*, 523 U.S. 614, 623–624 (1998).

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"The Supreme Court has not explicitly defined what constitutes 'new reliable evidence' under the *Schlup* actual-innocence standard." *Hancock v. Davis*, 906 F.3d 387, 389 (5th Cir. 2018). However, the Fifth Circuit has made clear that "evidence does not qualify as 'new' under the *Schlup* actual-innocence standard if 'it was always within the reach of [petitioner's] personal knowledge or reasonable investigation.'" *Hancock*, 906 F.3d at 390 (quoting *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008)). Petitioner argues that he has an alibi defense because he was home with back pain. Petitioner contends there was testimony supporting this defense. Petitioner contends his counsel failed to obtain Petitioner's medical records which would have corroborated the testimony regarding his alibi by showing the seriousness of his back injury. Unfortunately for Petitioner, this does not qualify as new evidence. Petitioner's medical records were clearly available at the time of his trial and Petitioner knew at that time that counsel was not utilizing them. There is simply no new evidence whatsoever that would support a claim of actual innocence.

The record does not reflect that any unconstitutional state action impeded Petitioner from filing for federal habeas corpus relief prior to the end of the limitations period. Furthermore, Petitioner has not shown that he could not have discovered the factual predicate of his claims earlier. Finally, the claims do not concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review.

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CONCLUSION

Petitioner's application for habeas corpus relief is dismissed with prejudice as time-barred.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c) (1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, 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." *Id.*

In this case, reasonable jurists could not debate the dismissal or denial of the Petitioner's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, a certificate of appealability shall not issue.

It is therefore **ORDERED** that Petitioner's application for writ of habeas corpus is **DISMISSED WITH PREJUDICE** as time-barred.

It is finally **ORDERED** that a certificate of appealability is **DENIED.**

SIGNED on February 5, 2021

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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

THOMAS JOHNNY WILKINS	§	
#2074591	§	
	§	
V.	§	**W-20-CA-1109-ADA**
	§	
BOBBY LUMPKIN	§	

FINAL JUDGMENT

Before the Court is the above styled and numbered cause. On this date, the Court dismissed Petitioner Thomas Johnny Wilkins's Application for Habeas Corpus Relief and determined that a certificate of appealability shall not be issued. Accordingly, as all issues in this cause have been resolved, the Court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

It is therefore **ORDERED** that Petitioner Thomas Johnny Wilkins's Application for Habeas Corpus Relief is hereby **DISMISSED WITH PREJUDICE** as time-barred.

It is finally **ORDERED** that the above styled and numbered cause is hereby **CLOSED.**

SIGNED on February 5, 2021

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

ADDK #25

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