

United States Court of Appeals
for the Fifth Circuit

No. 21-20477

United States Court of Appeals
Fifth Circuit

FILED

February 11, 2022

EARNEST J. MATTHEWS,

Lyle W. Cayce
Clerk

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 Southern District of Texas
USDC No. 4:21-CV-2132

ORDER:

Earnest J. Matthews, Texas prisoner # 1191251, moves for a certificate of appealability (COA) to appeal the dismissal, as time barred, of his 28 U.S.C. § 2254 petition challenging his conviction for aggravated sexual assault of a child. He also moves for the appointment of counsel. Matthews contends that he is entitled to excuse failure to comply with the one-year limitation period based on his actual innocence. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

To obtain a COA, Matthews must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy that

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burden in this case, he must show “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).

Matthews fails to make the requisite showing. Accordingly, the motion for a COA is DENIED. Matthews’s motion to appoint counsel is also DENIED.



ANDREW S. OLDHAM
United States Circuit Judge

- (d)(1) A 1-year period of limitations 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.

28 U.S.C. §§ 2244(d)(1)–(2).

Public state court records show that petitioner pleaded guilty to aggravated sexual assault of a child under case number 01-DCR-034572 in Fort Bend, County, and was sentenced to serve twenty-five years in prison on September 9, 2003. No direct appeal was taken. Petitioner's conviction became final, at the latest, on October 9, 2003, and the one-year AEDPA limitation expired on Monday, October 11, 2004. Online state court records

show that petitioner's application for state habeas relief, filed with the trial court in November 2012, was denied by the Texas Court of Criminal Appeals on March 5, 2014. Because petitioner's application for state habeas relief was filed after expiration of the AEDPA one-year limitation, the application had no tolling effect. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) ("Finally, Scott's habeas application did not toll the limitation period under § 2244(d)(2) because it was not filed until after the period of limitations had expired.").

II. ANALYSIS

Petitioner filed the instant federal petition no earlier than June 21, 2021. Because the petition showed on its face that it was untimely by over sixteen years, the Court ordered petitioner to show cause, by written response, why his petition should not be dismissed as barred by limitations. In his response, petitioner claims that his petition should not be dismissed as time-barred because on May 1, 2021, he "was allowed to speak to a special prosecutor about his claims." (Docket Entry No. 7, p. 1.) He contends that he did not commit the crime, and requests an investigation of the true culprit – former attorney G.W. *See Matthews v. White*, C.A. No. H-17-3378 (S.D. Tex. April 4, 2018) (dismissing petitioner's civil claims against G.W. for causing him to be convicted for G.W.'s own criminal misconduct). Petitioner filed a second civil lawsuit in 2020 against Fort Bend County prosecutors and law enforcement officials for their failure in 2004 to investigate his

claim that G.W. also sexually assaulted him. *See Matthews v. Healey*, C.A. No. H-20-2978 (S.D. Tex. Sept. 11, 2020) (dismissed as frivolous).

Petitioner's habeas claims are barred by the AEDPA statute of limitations. However, liberally construed, petitioner's allegations raise a claim of actual innocence, which "serves as a gateway through which a petitioner may pass . . . [to excuse] the expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). The Supreme Court has cautioned that "tenable actual-innocence gateway pleas are rare[.]" *Id.* To prevail on the claim, a petitioner must present a credible claim of actual innocence based on "new reliable evidence . . . that was not presented at trial," and he "must show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt" in light of that new evidence of his factual innocence. *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995).

Here, petitioner does not meet his burden to show actual innocence premised on new reliable evidence. To the contrary, he reiterates unsupported assertions of innocence that he first raised in 2004. That he recently spoke to "a special prosecutor" regarding his claims against G.W. does not raise a colorable showing that, more likely than not, no reasonable juror would have found him guilty beyond a reasonable doubt.

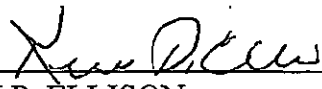
Petitioner is not entitled to equitable tolling of limitations predicated on actual innocence. His habeas claims are barred by the AEDPA one-year statute of limitations and must be dismissed. To the extent petitioner asks this Court to undertake a federal

investigation of G.W.'s wrongdoings or order federal officials to initiate an investigation, this Court has no authority to undertake or order an investigation of G.W. at petitioner's behest.

III. CONCLUSION

This case is **DISMISSED WITHOUT PREJUDICE** as barred by limitations. Any and all pending motions are **DENIED**. A certificate of appealability is **DENIED**.

Signed at Houston, Texas, on this the 18th day of August, 2021.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE