United States Court of Appeals for the Fifth Circuit

No. 22-10019

PAUL DOUGLAS JACKSON,

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 Northern District of Texas
USDC No. 3:21-CV-2632

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of February 18, 2022, for want of prosecution. The appellant failed to timely pay the filing fee.

A True Copy
Certified order issued Feb 18, 2022

Clerk, U.S. Court of Appeals, Fifth Circuit

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
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PAUL DOUGLAS JACKSON,	§	
	§	
Petitioner,	§	
	§	
v.	§	No. 3:21-CV-02632-X-BN
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND DENYING A CERTIFICATE OF APPEALABILITY

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case [Doc. No. 6] (the FCR). Specifically, the Magistrate Judge recommends dismissing the petitioner's application for a writ of habeas corpus under 28 U.S.C. § 2254 because the application is untimely and the petitioner does not argue actual innocence, statutory tolling, or equitable tolling. The petitioner made objections. [Doc. No. 8].

The Court has reviewed the FCR *de novo* and finds that the petitioner's application is indeed time-barred. Although the petitioner asserts in his objection to the Magistrate Judge's recommendation that he "presented a Claim of Actual Innocence," he did not do so.[1] And the petitioner also failed to argue that equitable

[1] On this point, all that the petitioner says is that he told his counsel that he did not commit the offense. That is not enough. To circumvent AEDPA's statute of limitations, a petitioner must present extremely strong evidence of factual innocence. *See McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013).

or statutory tolling could excuse his 13-year delay in filing his § 2254 application. Accordingly, the Court **ACCEPTS** the FCR. The Clerk of the Court shall serve this order on the Texas Attorney General.

The petitioner has also filed a motion for certificate of appealability on the FCR. [Doc. No. 9]. But only this Court's order can be appealed. *See generally* 28 U.S.C. § 2253. So the Court **DENIES** the motion for a certificate of appealability as to the FCR.

And, considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court **DENIES** a certificate of appealability as to this order. The Court adopts and incorporates by reference the FCR in support of its finding that Petitioner has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" or "debatable whether [this Court] was correct in its procedural ruling."[2]

IT IS SO ORDERED this 16th day of December, 2021.

BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

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

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PAUL DOUGLAS JACKSON, TDCJ No. 1460648, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:21-cv-2632-X

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered, it is ORDERED, ADJUDGED and DECREED that, under Rule 4 of the Rules Governing Section 2254 Cases, Petitioner's 28 U.S.C. § 2254 habeas application is DISMISSED with prejudice as time barred.

The Clerk of Court shall serve this judgment and the order accepting the magistrate judge's findings, conclusions, and recommendation on Petitioner and on the Texas Attorney General.

SIGNED this 17th day of December, 2021.

BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

In The United States Court of Appeals
Fifth Circuit

Paul Douglas Jackson
Petitioner - Appellant

§
§ U.S.D.C. No. 3:21-CV-2632X
§
v. §
§ Appeal No. _____
Bobby Lumpkin
Director, TDCJ §
Respondent. §
§

Notice of Appeals

This Notice is hereby given that Paul Douglas Jackson, Petitioner, Appellant, Pro-Se, pursuant a Notice of Appeals to the United States Court of Appeals for the Fifth Circuit Court from the United States District Court for the Northern District of Texas ORder of final Judgment, Dismissed with prejudice as time barred. Where the District Court rejects the Petitioners Claim of Actual Innocence accompanied by a Claim of a Constitutional violation, Denying the Petitioner a Certificate of Appealability. on December 17, 2021 by U.S.D.C. Judge Brantley Starr

Certificate of Service

I, Paul D. Jackson #1460648 pro-Se certify that a true copy and Correct copy of the foregoing was been post mail on December 28, 2021

Sincerely
Paul D. Jackson #1460648

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 05, 2022

Ms. Karen S. Mitchell
Northern District of Texas, Dallas
United States District Court
1100 Commerce Street
Earle Cabell Federal Building
Room 1452
Dallas, TX 75242

Re: Paul Douglas Jackson #1460648
USDC No. 3:21-CV-2632

Dear Ms. Mitchell,

I am forwarding a notice of appeal erroneously sent to us. We have noted the date received here. When you file the notice of appeal, please use that date, see FED. R. APP. P. 4(d).

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

January 10, 2022

#1460648
Mr. Paul Douglas Jackson
CID Wainwright Unit
2665 Prison Road 1
Lovelady, TX 75851

No. 22-10019 Jackson v. Lumpkin
USDC No. 3:21-CV-2632

Dear Mr. Jackson,

We have docketed your appeal. You should use the number listed above on all future correspondence.

You should carefully read the following sections

Filings in this court are governed strictly by the Federal Rules of Appellate Procedure, **NOT** the Federal Rules of Civil Procedure. We cannot accept motions submitted under the Federal Rules of Civil Procedure. We can address only those documents the court directs you to file, or motions filed under the FED. R. APP. P. in support of the appeal. See FED. R. APP. P. and 5TH CIR. R. 27 for guidance. Documents not authorized by these rules will not be acknowledged or acted upon.

Court Fees

You must pay a filing fee for your notice of appeal unless the district court has entered an order exempting you from paying the fee under FED. R. APP. P. 24. The $505.00 Court of Appeals docketing fee is due within 15 days from this date, and you must notify this office once this is done. If you do not pay the filing fee, or file a motion with the district court clerk for leave to proceed in forma pauperis on appeal, we will dismiss your appeal without further notice, see 5TH CIR. R. 42.3.

Special guidance regarding filing certain documents:

General Order No. 2021-1, dated January 15, 2021, requires parties to file in paper highly sensitive documents (HSD) that would ordinarily be filed under seal in CM/ECF. This includes documents likely to be of interest to the intelligence service of a foreign

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PAUL DOUGLAS JACKSON, TDCJ No. 1460648, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:21-cv-2632-X-BN

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Paul Douglas Jackson, a Texas prisoner, was convicted of indecency with a child younger than 17 years, in violation of Texas Penal Code § 21.11, and was sentenced to 20 years of imprisonment. *See State v. Jackson*, F-0666697-W (363d Jud. Dist. Ct., Dallas Cnty., Tex. Sept. 10, 2007); Dkt. No. 3 at 2. He did not appeal. *See* Dkt. No. 3 at 3. But he did collaterally attack this conviction and sentence through an application for a state writ of habeas corpus, which the Texas Court of Criminal Appeals denied without written order on the trial court's findings without a hearing. *See Ex parte Jackson*, WR-86,410-02 (Tex. Crim. App. Oct. 18, 2017); Dkt. No. 3 at 3-4. And, on October 25, 2021, the Court docketed Jackson's undated *pro se* application for a writ of habeas corpus under 28 U.S.C. § 2254. *See* Dkt. Nos. 3, 4.

United States District Judge Brantley Starr referred the Section 2254 application to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference. And the undersigned enters these findings of fact, conclusions of law, and recommendation

that the Court should dismiss the habeas application with prejudice as time barred under Rule 4 of the Rules Governing Section 2254 Cases (Habeas Rule 4).

Legal Standards

Under Habeas Rule 4, a district court may summarily dismiss a 28 U.S.C. § 2254 habeas application "if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." *Id.*

> This rule differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses. The district court has the power under [Habeas] Rule 4 to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state. This power is rooted in "the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer."

Kiser v. Johnson, 163 F.3d 326, 328 (5th Cir. 1999) (quoting 28 U.S.C. foll. § 2254 Rule 4 Advisory Committee Notes).

And the Court may exercise this power to summarily dismiss Jackson's application with prejudice as time barred under Habeas Rule 4.

"[E]ven though the statute of limitations provision of the AEDPA is an affirmative defense rather than jurisdictional," a district court may dismiss a time barred Section 2254 application *sua sponte* under Habeas Rule 4. *Kiser*, 163 F.3d at 329. But, "'before acting on its own initiative' to dismiss an apparently untimely § 2254 petition as time barred, a district court 'must accord the parties fair notice and an opportunity to present their positions.'" *Wyatt v. Thaler*, 395 F. App'x 113, 114 (5th Cir. 2010) (per curiam) (quoting *Day v. McDonough*, 547 U.S. 198, 210 (2006); alteration to original).

Under the circumstances here, these findings, conclusions, and recommendation provide Jackson fair notice, and the opportunity to file objections to them affords him a chance to present to the Court his position as to limitations concerns explained below. *See, e.g.*, *Ingram v. Director, TDCJ-CID*, No. 6:12cv489, 2012 WL 3986857, at *1 (E.D. Tex. Sept. 10, 2012) (a magistrate judge's report and recommendation gives the parties "fair notice that the case may be dismissed as time-barred, which [gives a petitioner] the opportunity to file objections to show that the case should not be dismissed based on the statute of limitation" (collecting cases)).

AEDPA establishes a one-year statute of limitations for federal habeas proceedings brought under 28 U.S.C. § 2254. *See* ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, Pub. L. 104-132, 110 Stat. 1214 (1996). The limitations period runs 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.

28 U.S.C. § 2244(d)(1).

The time during which a properly filed application for state post-conviction or

other collateral review is pending is excluded from the limitations period. *See id.* § 2244(d)(2).

The one-year limitations period is also subject to equitable tolling – "a discretionary doctrine that turns on the facts and circumstances of a particular case," *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), and only applies in "rare and exceptional circumstances," *United States v. Riggs*, 314 F.3d 796, 800 n.9 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). "[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

Taking the second prong first, "[a] petitioner's failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify." *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (per curiam) (citation omitted). This "prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond [the litigant's] control." *Menominee Indian Tribe*, 577 U.S. at 257.[1]

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[1] *See, e.g., Farmer v. D&O Contractors*, 640 F. App'x 302, 307 (5th Cir. 2016) (per curiam) (holding that because "the FBI did not actually prevent Farmer or any other Plaintiff from filing suit" but instead "advised Farmer that filing suit would have been against the FBI's interest" and "that the RICO claims could be filed after the investigation concluded," "[a]ny obstacle to suit was ... the product of Farmer's

But "'[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.' What a petitioner did both before and after the extraordinary circumstances that prevented him from timely filing may indicate whether he was diligent overall." *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019) (quoting *Holland*, 560 U.S. at 653; footnote omitted).

And a showing of "actual innocence" can also overcome AEDPA's statute of limitations. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the actual innocence gateway is only available to a petitioner who presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* at 401 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)). That is, the petitioner's new, reliable evidence must be enough to persuade the Court that "'no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Id.* at 386 (quoting *Schlup*, 513 U.S. at 329).[2]

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mistaken reliance on the FBI, and a party's mistaken belief is not an extraordinary circumstance" (citation omitted)).

[2] *See also Johnson v. Hargett*, 978 F.2d 855, 859-60 (5th Cir. 1992) ("The Supreme Court has made clear that the term 'actual innocence' means *factual*, as opposed to *legal*, innocence – 'legal' innocence, of course, would arise whenever a constitutional violation by itself requires reversal, whereas 'actual' innocence, as the Court stated in *McCleskey [v. Zant*, 499 U.S. 467 (1991)], means that the person did not commit the crime." (footnotes omitted)); *Acker v. Davis*, 693 F. App'x 384, 392-93 (5th Cir 2017) (per curiam) ("Successful gateway claims of actual innocence are 'extremely rare,' and relief is available only in the 'extraordinary case' where there was 'manifest injustice.' *Schlup*, 513 U.S. at 324, 327. When considering a gateway claim of actual innocence, the district court must consider all of the evidence, 'old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.' *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks and citations

Analysis

The timeliness of most Section 2254 applications – Jackson's is no exception – is determined under Subsection A, based on the date on which the judgment became final. A state criminal judgment becomes final under AEDPA "when there is no more 'availability of direct appeal to the state courts.'" *Frosch v. Thaler*, No. 2:12-cv-231, 2013 WL 271423, at *1 (N.D. Tex. Jan. 3, 2013) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009)), *rec. adopted*, 2013 WL 271446 (N.D. Tex. Jan. 24, 2013).

Because Jackson did not appeal the conviction and sentence he now collaterally attacks under Section 2254, the applicable state criminal judgment became final for federal-limitations purposes on the thirtieth day after it was entered (on September 10, 2007) that was not a Saturday, Sunday, or legal holiday – which was on October 10, 2007. *See* TEX. R. APP. P. 26.2(a)(1). And, "[b]ecause [Jackson's] state habeas petition was not filed within the one-year period" that commenced on that date, "it did not statutorily toll the limitation clock." *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013) (citing *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (citing, in turn, 28 U.S.C. § 2244(d)(2))).

Accordingly, under Section 2244(d)(1)(A), the Section 2254 application was filed some 13 years too late. The application is therefore due to be denied as untimely absent statutory or equitable tolling of the limitations period or establishment of

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omitted). 'Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do."' *Id.* (quoting *Schlup*, 513 U.S. at 329). 'The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.' *Id.*" (citations modified)).

actual innocence. But Jackson fails to explain how another provision of Section 2244(d)(1) could apply here, fails to advance a claim of tolling under the narrow actual innocence gateway, and fails to provide allegations that could establish either prong of equitable tolling – that he pursued his rights diligently and that an extraordinary circumstance beyond his control prevented his timely filing of the federal petition. *See* Dkt. Nos. 3, 4.

The Court should therefore dismiss the Section 2254 petition with prejudice as time barred.

Recommendation and Directions to Clerk

Under Rule 4 of the Rules Governing Section 2254 Cases, the Court should dismiss Petitioner Paul Douglas Jackson's 28 U.S.C. § 2254 habeas application with prejudice. And the Court should direct that the Clerk of Court serve any order accepting or adopting this recommendation on the Texas Attorney General.

The Clerk shall serve electronically a copy of this recommendation and the petition, along with any attachments thereto and brief in support thereof, on the Texas Attorney General as counsel for Respondent, directed to the attention of Edward L. Marshall, Chief, Criminal Appeals Division, Texas Attorney General's Office. *See* RULE 4, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections

within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: October 28, 2021

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE