# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 5, 2022
Lyle W. Cayce
Clerk

No. 19-10079

SAM JONES,

*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. 3:17-CV-1028

Before JONES, HIGGINSON, and DUNCAN, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*.

The question presented is whether Sam Jones's federal habeas application is time-barred. It is undisputed that Jones filed the instant application after the one-year limitations period in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and that he is not entitled to any statutory tolling. Thus, the timeliness inquiry turns on whether Jones is entitled to equitable tolling. The district court held that Jones is not entitled to equitable tolling and dismissed the application. This court granted

a certificate of appealability on the equitable-tolling question and we now AFFIRM.

## BACKGROUND

In 2012, a Texas jury convicted Sam Jones of aggravated assault with a deadly weapon against a witness and sentenced him to life imprisonment. The Texas Court of Appeals affirmed his conviction and sentence on direct appeal, and the Texas Court of Criminal Appeals denied his petition for review on November 27, 2013. Because Jones did not seek a writ of certiorari from the Supreme Court, his conviction became final 90 days later on February 25, 2014.

On April 28, 2014, Jones filed a *pro se* application for state habeas relief. Jones attached a 112-page memorandum in support of his state habeas application, outlining a litany of alleged instances of ineffective assistance of counsel and abuses of discretion by the trial court. Knowing that Texas Rule of Appellate Procedure 73.1(d) limited such memoranda to 50 pages, Jones simultaneously sought leave to exceed the page limit. The State responded that the Texas Court of Criminal Appeals would likely reject Jones's state habeas application as non-compliant with Rule 73.1(d). The trial court agreed and recommend that Jones's application be dismissed. On July 9, 2014, the Texas Court of Criminal Appeals dismissed Jones's state habeas application for not complying with Rule 73.1(d).

Rather than simply refile a compliant state habeas application, Jones filed a § 2254 application in federal court on July 21, 2014. The State answered on November 20, 2014, emphasizing that Jones failed to exhaust his state remedies and arguing that, as a result, the district court should dismiss his § 2254 application. The magistrate judge agreed and recommended that the district court dismiss Jones's application. In response, on March 30, 2015, Jones moved to stay the § 2254 proceedings so

he could present his unexhausted claims in a new state habeas application. Even though dismissing Jones's § 2254 application at that time would make any future applications untimely, the magistrate judge recommended that the district court deny the stay motion. The district court adopted the magistrate judge's recommendation and dismissed the § 2254 application without prejudice and denied Jones a certificate of appealability.

Jones sought a certificate of appealability from this court, primarily challenging the district court's decision to deny his stay request. This court denied Jones's motion for a certificate of appealability on June 24, 2016.

During that appeal, Jones returned to state court and filed a second state habeas application. Once again, the Texas Court of Criminal Appeals dismissed the state habeas application for not complying with Rule 73.1(d)'s 50-page limit. Jones then filed a *third* state habeas application—one that complied with the 50-page limit—on December 4, 2015. The Texas Court of Criminal Appeals denied that state habeas application on March 29, 2017.

Finally, on April 5, 2017, having exhausted his claims in state habeas proceedings, Jones filed the instant § 2254 application. The State argued that Jones's § 2254 application is time-barred because he failed to file it within the limitations period and that he is not entitled to any tolling. Jones rejoined that he is entitled to equitable tolling because he exercised diligence in pursuing his rights and because the state procedural rules misled him about the possibility of refiling a state habeas application after the Texas Court of Criminal Appeals dismissed his first one. The magistrate judge recommended that the district court dismiss Jones's § 2254 application as untimely, concluding that Jones failed to show that he is entitled to equitable tolling. The district court agreed, accepted the magistrate judge's recommendation, and dismissed Jones's application.

Here, there is no dispute that Jones is not entitled to statutory tolling because he never "properly filed" a state habeas application during the limitations period.[1] Jones filed his first state habeas application on April 28, 2014, but the Texas Court of Criminal Appeals dismissed it for noncompliance with Texas Rule of Appellate Procedure 73.1(d). A state application dismissed on those grounds is not properly filed. *See Artuz v. Bennett*, 531 U.S. 4, 8, 121 S. Ct. 361, 364 (2000) ("[A]n application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.").[2] Jones did not succeed in "properly filing" a state habeas application until much later, on December 4, 2015. By that time, however, the § 2244 limitations period had expired. Thus, whether Jones's current § 2254 application is timely hinges on whether he is entitled to equitable tolling.

Equitable tolling is "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). Because of the limitations placed on second and successive federal habeas applications,[3] courts are "cautious not to apply the statute of limitations too harshly." *Id.* Nevertheless, equitable tolling is warranted in only "rare and exceptional circumstances." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). It is appropriate where the petitioner shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*,

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[1] It is well settled that the time during which a *federal* habeas application is pending does not serve to statutorily toll the limitations period under 28 U.S.C. § 2244(d)(2). *See Duncan v. Walker*, 533 U.S. 167, 181, 121 S. Ct. 2120, 2129 (2001).

[2] *See also Wickware v. Thaler*, 404 F. App'x 856, 858-59 (5th Cir. 2010) (noting that a state habeas action dismissed for failure to comply with Texas Rules of Appellate Procedure 73.1 and 73.2 was not "properly filed" under AEDPA).

[3] *See* 28 U.S.C. § 2244(b).

560 U.S. at 649, 130 S. Ct. at 2562 (internal quotation marks and citation omitted). And equitable tolling applies principally where the defendant actively misleads the plaintiff about the cause of action or prevents the plaintiff from asserting his rights in some extraordinary way. *United States v. Wheaten*, 826 F.3d 843, 851 (5th Cir. 2016) (citing *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir., 1999), *abrogated on other grounds by Causey v. Cain*, 450 F.3d 601, 605 (5th Cir. 2006)). Jones is not entitled to equitable tolling because he has not shown that extraordinary circumstances prevented timely filing.

Concerning the extraordinary circumstances necessary for equitable tolling, this court has explained that 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." *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (per curiam) (citation omitted). Such circumstances include, among others, when a petitioner receives delayed notice of a court order denying the petitioner's state habeas application or when a district court order misleads the petitioner. *Jackson v. Davis*, 933 F.3d 408, 411 (5th Cir. 2019) (eighteen-month delay in receiving order denying state habeas application despite repeated inquiries into status of that application); *Prieto v. Quarterman*, 456 F.3d 511, 515-16 (5th Cir. 2006) (district court order granting extension of time to file federal habeas petition on date after limitations period expired). Critically, however, a petitioner's failure to comply with state procedural law or general ignorance of the law do not qualify as extraordinary circumstances for purposes of equitable tolling. *See Larry v. Dretke*, 361 F.3d 890, 897-98 (5th Cir. 2004) (untimeliness resulting from failure to comply with procedural requirement that a state habeas application be filed after conviction becomes final did not warrant equitable tolling); *Fisher*, 174 F.3d at 714 (noting that "ignorance of the law, even for

an incarcerated *pro se* petitioner, generally does not excuse prompt filing" (citations omitted)).

Jones argues that the circumstances here are extraordinary and therefore warrant equitable tolling. He points out that he filed his original § 2254 application 219 days before the AEDPA limitations period lapsed. That application lingered in the district court for 403 days. During that time, prompted by the magistrate judge's recommendation to dismiss the application for failure to exhaust, Jones also requested a stay to allow him to exhaust his state remedies. Ultimately, however, the district court denied the stay and dismissed his federal habeas application for failure to exhaust. In short, Jones attributes his untimeliness to the district court's failure to promptly resolve his original federal habeas application and to its decision to deny his motion for a stay.

In arguing that these circumstances warrant equitable tolling, Jones relies on Justice Stevens's concurrence in *Duncan v. Walker*, 533 U.S. 167, 121 S. Ct. 2120 (2001), and two out-of-circuit cases, *Griffin v. Rogers*, 399 F.3d 626 (6th Cir. 2005), and *Rodriguez v. Bennett*, 303 F.3d 435 (2d Cir. 2002). Justice Stevens's concurrence in *Duncan* is hardly dispositive; it only suggests that "a federal court might very well conclude" that equitable tolling is warranted during the pendency of a timely federal habeas petition later dismissed for failure to exhaust after the limitations period has lapsed. 533 U.S. at 183, 121 S. Ct. at 2130.

Moreover, the out-of-circuit cases are neither binding nor persuasive. In *Griffin*, the Sixth Circuit concluded that equitable tolling was appropriate in similar circumstances. 399 F.3d at 636-39. But, in doing so, it relied on an

equitable tolling test that it later disavowed in light of *Holland*.[4] Thus, *Griffin* is not persuasive. *Rodriguez* is no more persuasive because it, at most, merely intimates that equitable tolling might be appropriate where a petitioner's timely, but unexhausted, § 2254 application is dismissed without prejudice after AEDPA's limitations period has lapsed. *Rodriguez*, 303 F.3d at 439 (remanding for district court to consider "whether, and to what extent, Rodriguez should benefit from equitable tolling"). In sum, Jones offers little to no support for his argument that the circumstances in his case are so extraordinary to necessitate equitable tolling.

More importantly, Jones's plight is entirely self-inflicted and stems from his failure to comply with basic state procedural rules—about which he had notice. Texas Rule of Appellate Procedure 73.1(d) provides that a memorandum attached to a state habeas application "shall not exceed . . . 50 pages" and that if the memorandum exceeds 50 pages then the court may dismiss the application unless it grants leave to exceed "for good cause." TEX. R. APP. P. 73.1(d). Jones knew about the 50-page limitation; indeed, he filed a motion seeking leave to exceed the limitation. The Texas Court of Criminal Appeals quickly dismissed his state habeas application for not complying with Rule 73.1(d), leaving him 231 days to refile in state court. If Jones had simply refiled a state habeas application compliant with Rule 73.1, he would be entitled to statutory tolling. 28 U.S.C. § 2244(d)(2). Instead, he went directly to federal court, thinking that the order dismissing his state habeas application precluded him from refiling. But, as explained above, a petitioner's unfamiliarity with the law is not an extraordinary circumstance

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[4] *See Griffin*, 399 F.3d at 635 (citing five-factor test articulated in *Dunlap v. United States*, 250 F.3d 1001, 1008 (6th Cir. 2001)); *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749-50 (6th Cir. 2011) (recognizing that the equitable tolling test articulated in *Holland* is "analytically distinct from *Dunlap*'s five-factor inquiry" and that *Holland*'s two-part test "has become the law" of the circuit).

that supports equitable tolling. *Fisher*, 174 F.3d at 714. Accordingly, Jones is unable to show that he is entitled to equitable tolling.

Furthermore, in responding to Jones's initial, unexhausted § 2254 application, the State pointed out that Jones had failed to exhaust his state remedies and that he needed to refile in state court before proceeding to federal court. At that point, Jones still had 97 days before AEDPA's limitations period lapsed. Then, the magistrate judge recommended that the district court dismiss Jones's initial § 2254 application for failure to exhaust eight days before AEDPA's limitations period lapsed. Either of those warnings were enough to notify Jones of his procedural misstep. Nevertheless, he continued to litigate in federal court and did not refile his habeas application in state court until long after AEDPA's limitations period had expired.[5]

In short, Jones cannot show the extraordinary circumstances necessary for equitable tolling because his failure to timely file the instant petition is the result of his own procedural mistakes. As a result, the district court did not err, much less abuse its discretion, in declining to equitably toll AEDPA's limitations period in this case.

## CONCLUSION

For the forgoing reasons, this court AFFIRMS. Jones's motion to appoint counsel is therefore DENIED AS MOOT.

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[5] To his credit, Jones moved to stay the federal habeas proceedings after the magistrate judge recommended that the district court dismiss the action for failure to exhaust. Even so, because Jones's own procedural mistakes necessitated that motion, it does not help him get equitable tolling in this proceeding.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| SAM JONES, ID # 1787475, Petitioner, | ) | |
| vs. | ) | No. 3:17-CV-1028-B |
| LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent. | ) | |

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

After reviewing all relevant matters of record in this case, including the Findings, Conclusions, and Recommendation of the United States Magistrate Judge and any objections thereto, in accordance with 28 U.S.C. § 636(b)(1), the Court is of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are accepted as the Findings and Conclusions of the Court. For the reasons stated in the Findings, Conclusions, and Recommendation of the United States Magistrate Judge, the petition for habeas corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED** with prejudice as barred by the statute of limitations.

In accordance with Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c) and after considering the record in this case and the recommendation of the Magistrate Judge, petitioner is **DENIED** a Certificate of Appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions and Recommendation in support of its finding that the 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." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

If the petitioner files a notice of appeal, he must pay the $505.00 appellate filing fee or submit a motion to proceed *in forma pauperis* and a properly signed certificate of inmate trust account.

**SIGNED this 3rd day of January, 2019.**

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| SAM JONES, | ) | |
| ID # 1787475, | ) | |
| Petitioner, | ) | |
| vs. | ) | No. 3:17-CV-1028-B |
| | ) | |
| LORIE DAVIS, Director, | ) | |
| Texas Department of Criminal | ) | |
| Justice, Correctional Institutions Division, | ) | |
| Respondent. | ) | |

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:

1. The petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 is **DENIED** with prejudice as barred by the statute of limitations.

2. The Clerk shall transmit a true copy of this Judgment and the Order Accepting the Findings and Recommendation of the United States Magistrate Judge to all parties.

**SIGNED this 3rd day of January, 2019.**

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

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

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| **SAM JONES,** | ) | |
| **ID # 1787475,** | ) | |
| **Petitioner,** | ) | |
| **vs.** | ) | **No. 3:17-CV-1028-B (BH)** |
| | ) | |
| **LORIE DAVIS, Director, Texas** | ) | **Referred to U.S. Magistrate Judge** |
| **Department of Criminal Justice,** | ) | |
| **Correctional Institutions Division, et al.,** | ) | |
| **Respondent.** | ) | |

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION**

By *Special Order 3-251*, this habeas case has been referred for findings, conclusions, and recommendation. Based on the relevant findings and applicable law, the petition for writ of habeas corpus under 28 U.S.C. § 2254 should be **DENIED** as barred by the statute of limitations.

## I. BACKGROUND

Sam Jones (Petitioner) challenges his conviction for aggravated assault. The respondent is Lorie Davis, Director of the Texas Department of Criminal Justice (TDCJ), Correctional Institutions Division (Respondent).

### A. Trial and Appeal

On September 30, 2011, the State of Texas indicted Petitioner, as Samuel Lee Jones, for aggravated assault against a witness/informant in Cause No. F11-14842. (*See* doc. 20-14 at 19.)[1] He pleaded not guilty and was tried before a jury in Criminal District Court #1 of Dallas County, Texas.

Petitioner and his girlfriend had a fight, and they were both arrested and charged with misdemeanors. After they were released on bond, Petitioner visited his girlfriend and asked her to

[1] Page citations refer to the CM/ECF system page number at the top of each page rather than the page numbers at the bottom of each filing.

drop the charges and sign affidavits. She agreed to drop the charges but declined to sign the affidavits because they contained false statements. Petitioner insisted that she sign the affidavits, and the girlfriend tried to leave. He grabbed a knife, knocked her down, hit her, stabbed her repeatedly, and told her that he was going to kill her.

Petitioner testified that he had problems getting a job due to his criminal record. He was required to register as a sex offender because of a prior conviction. He claimed that he had registered but had been charged with failing to register at the time of the incident with his girlfriend. Going to jail for the misdemeanor assault against his girlfriend made him hysterical. When she refused to sign the affidavits, the fear of returning to prison made him "snap," and something in his mind told him to "kill the devil." He testified that he remembered grabbing the knife but did not remember stabbing her. On cross-examination, however, he admitted that he knew that he stabbed her and fled in his car to a friend's house. He claimed that he was driven to insanity because he was stressed, and that his parole officer had lied about the sex offender registration requirement. Petitioner's friends testified that he was usually a nice guy and a happy employee. At the time of the offense, he had changed and was worrying. He appeared to be upset and distraught on the day of the offense. The trial court refused to instruct the jury on the defense of insanity. *See Jones v. State*, No. 05-12-00618-CR, 2013 WL 3717771 at *1-2 (Tex. App. – Dallas 2014).

On April 25, 2012, the jury convicted Petitioner, and he was sentenced to life imprisonment. (*See id.* at 113.) The judgment was affirmed on appeal. (*See* doc. 20-11 at 6); *see also Jones*, No. 2013 WL 3717771. His petition for discretionary review was refused. *See Jones v. State*, PD-1047-13 (Tex. Crim. App. Nov. 27, 2013). He did not file a petition for writ of certiorari.

**B. Habeas Proceedings**

Petitioner's first state habeas application was signed on April 28, 2014, and received by the state court on May 12, 2014. (*See* doc. 20-22 at 5, 45.) On July 9, 2014, it was dismissed as non-compliant with Texas Rule of Appellate Procedure 73.1. (*See* doc. 20-19); *Ex parte Jones*, WR-38,160-03 (Tex. Crim. App. July 9, 2014).

Petitioner filed a federal habeas petition under § 2254 on July 25, 2014. (*See* No. 3:14-CV-3134-D, doc. 1.) On November 20, 2014, the respondent responded that the petition should be dismissed for failure to exhaust state remedies. (*See id.*, doc. 26.) On February 17, 2015, it was recommended that the petition be dismissed as unexhausted. (*See id.*, doc. 35.) Petitioner filed objections on March 10, 2015, a motion for a stay and abeyance on March 30, 2015, and a supplemental motion for a stay and abeyance on April 3, 2015. (*See id.*, docs. 36, 40, 42.) On July 15, 2015, it was recommended that the motions to stay and abate be denied. (*See id.*, doc. 45.) Movant filed objections on August 6, 2015. (*See id.*, doc. 46.) On August 27, 2015, the motions to stay and abate were denied, and the petition was dismissed for failure to exhaust state remedies. (*See id.*, docs. 48, 49.) Petitioner appealed, and the Fifth Circuit Court of Appeals denied a certificate of appealability on June 24, 2016. (*See id.*, doc. 62); *Jones v. Davis*, No. 15-10927 (5th Cir. June 24, 2016).

His second state habeas application was signed on September 1, 2015, and received on September 15, 2015. (*See* doc. 20-34 at 5, 55.) On November 25, 2015, it was also dismissed as non-compliant with Texas Rule of Appellate Procedure 73.1. (*See* doc. 20-32); *Ex parte Jones*, WR-38,160-05 (Tex. Crim. App. Nov. 25, 2015).

Petitioner's third state habeas application was signed on December 4, 2015, and received by

the state court on December 16, 2015. (*See* doc. 20-67 at 5, 49.) It was denied without written order on March 29, 2017. (*See* doc. 20-46.)

**C. Substantive Claims**

Petitioner's federal petition, signed on April 5, 2017, raises the following grounds:

(1) Trial counsel was ineffective because he:

(a) failed to subpoena witness and evidence as instructed by Petitioner to show that Petitioner became insane because he was being maliciously prosecuted;

(b) waived an opening statement;

(c) failed to impeach the complainant's perjured testimony, lies, contradictions, and misleading statements;

(d) refused to subject the State's case to meaningful adversarial testing and refused to advocate the Petitioner's position;

(e) failed to obtain the appointment of a psychiatric expert in a timely fashion;

(f) failed to object to the psychiatrist's flawed 45-minute cursory evaluation and did not file a motion for a re-evaluation or second opinion by a different psychiatrist;

(g) failed to offer expert testimony on post-traumatic stress disorder;

(h) failed to present evidence of Petitioner's traumatic prison experiences;

(i) failed to argue the admission and relevance of evidence vital to the insanity defense;

(j) failed to properly develop and present the insanity defense;

(k) failed to prepare Petitioner and witnesses to testify;

(l) failed to interview state or defense witnesses, asked irrelevant questions in cross-examination, and asked questions of defense witnesses that were objected to as irrelevant;

(m) failed to interview parole officers and investigate their computer files;

(n) filed a generic motion for new trial;

(o) was constitutionally deficient in the totality of his representation;

(2) Petitioner is innocent of the offense by reason of insanity;

(3) The trial court ignored or denied Petitioner's motions to dismiss counsel; and

(4) The trial court refused to allow Petitioner to present evidence that would have supported his insanity defense.

(*See* doc. 3 at 12-23.) His supplemental petition claims:

(1) The trial court refused to instruct the jury on the defense of insanity; and

(2) Appellate counsel was ineffective.

(*See* doc. 29 at 2-3.) Respondent contends that the petition is barred by the statute of limitations. (*See* docs. 18 at 11, 34 at 11.)

## II. STATUTE OF LIMITATIONS

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1217, on April 24, 1996. Title I of the Act applies to all federal petitions for habeas corpus filed on or after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Because Petitioner filed his petition after its effective date, the Act applies to it. Title I of the Act substantially changed the way federal courts handle habeas corpus actions. One of the major changes is a one-year statute of limitations. See 28 U.S.C. § 2244(d)(1).

### A. Calculation of One-Year Period

The one-year period is calculated from the latest of either:

> (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.

*See id.* § 2244(d)(1)(A)-(D).

Here, the factual predicate for Petitioner's claims either became known or could have become known prior to the date his judgment became final.[2] His petition for discretionary review was refused on November 13, 2013. The judgment became final on February 11, 2014, when the ninety-day period for filing a petition for writ of certiorari expired. *See Flanagan v. Johnson*, 154 F.3d 196, 197 (5th Cir. 1998) (citing *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994)). He had until February 11, 2015, to file his federal habeas petition, absent any tolling of the statute of limitations.

**B. Statutory Tolling**

Section 2244 mandates that "[t]he 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)(2) (emphasis added). Petitioner's first and second state habeas applications were not properly filed under § 2244(d)(2) because they were dismissed as being non-compliant with a state procedural rule, so they did not toll the limitations period. *See Davis v. Quarterman*, 342 F. App'x. 952, 953 (5th Cir. Aug. 27, 2009) (holding that a state writ dismissed pursuant to Tex. R. App. P. 73.1 was not "properly filed" within the meaning of § 2244(d)(1)(A)). The prior federal habeas petition did not

[2] He has not alleged a state-created impediment that prevented him from filing his federal petition or any new constitutional right.

toll the limitations period. *See Duncan v. Walker*, 533 U.S. 167, 181 (2001) (holding "that § 2244(d)(2) does not toll the limitation period during the pendency of a federal habeas petition). His third state habeas application filed on December 4, 2015, also did not toll the limitations period because it had already expired. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (an application filed in state court after the limitations period has expired does not operate to statutorily toll the limitations period). Petitioner filed his § 2254 petition on April 5, 2017, the date that it was mailed.[3] Because it was filed more than two years after the judgment became final, it is untimely.

Petitioner argues that his § 2254 petition relates back to his prior federal habeas petition, so it is timely. "Construing an application filed after a previous application is dismissed without prejudice as a continuation of the first application for all purposes would eviscerate the AEDPA limitations period and thwart one of AEDPA's principal purposes." *Graham v. Johnson*, 168 F.3d 762, 780 (5th Cir. 1999). The petition does not relate back to his prior petition, so it is untimely.

**C. Equitable Tolling**

AEDPA's one-year statutory deadline is not a jurisdictional bar and can, in appropriate exceptional circumstances, be equitably tolled. *Holland v. Florida*, 560 U.S. 631 (2010); *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998); *cf. Felder v. Johnson*, 204 F.3d 168, 170-71 (5th Cir. 2000) (only "rare and exceptional circumstances" warrant equitable tolling). "The doctrine of equitable tolling preserves a [party's] claims when strict application of the statute of limitations would be inequitable." *Davis*, 158 F.3d at 810 (quoting *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995)). It "applies principally where [one party] is actively misled by the [other party] about the cause of action or is prevented in some extraordinary way from asserting his rights."

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[3] *See Coleman v. Johnson*, 184 F.3d 398, 401 (5th Cir. 1999) (recognizing that prisoners file their federal pleadings when they place them in the prison mail system).

*Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (quoting *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996)). A habeas petitioner is entitled to equitable tolling only if he shows that: 1) he has been pursuing his rights diligently, and 2) some extraordinary circumstance prevented a timely filing. *Holland*, 560 U.S. at 649, citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). He bears the burden to show entitlement to equitable tolling. *Phillips v. Donnelly*, 223 F.3d 797, 797 (5th Cir. 2000) (per curiam). Courts must examine each case in order to determine if there are sufficient exceptional circumstances that warrant equitable tolling. *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). The Fifth Circuit has also stated that when a prisoner contends that his ability to file a federal habeas petition has been affected by a state proceeding, the court should look at the facts to determine whether equitable tolling is warranted. *Coleman*, 184 F.3d at 402.

Petitioner asserts that he acted diligently in filing his habeas applications and petitions shortly after previous ones were dismissed or denied. He first contends that the failure to follow state habeas rules and procedures was due to his *pro se* status and misunderstanding of the rules and procedures. (*See* doc. 28 at 11.) His *pro se* status and lack of knowledge of the law are not extraordinary circumstances and do not support equitable tolling, however. *See Felder*, 204 F.3d at 171-72 (ignorance of the law and *pro se* status do not support equitable tolling).

Second, Petitioner contends that although his first federal habeas petition was dismissed without prejudice for failure to exhaust state remedies, the effect was a dismissal with prejudice because the limitations period expired while that petition was pending. He asserts that he is entitled to equitable tolling for that reason. In an analogous situation, the Fifth Circuit held that the fact that a state court did not immediately inform a state habeas applicant that the habeas application was improperly filed was not an extraordinary circumstance that warranted equitable tolling. *Jones v.*

*Stephens*, 541 F. App'x 499, 503-04 (5th Cir. 2013). As in *Jones*, it was Petitioner's failure to exhaust his claims with a compliant state habeas application that caused his federal petition to be untimely. *See id.* at 504. He has not shown that he is entitled to equitable tolling.

**D. Actual Innocence**

Petitioner also contends that he is innocent by reason of insanity. In *McQuiggin v. Perkins*, 569 U.S. 383, 386-91 (2013), the Supreme Court held that even where a habeas petitioner has failed to demonstrate the due diligence required to equitably toll the statute of limitations, a plea of actual innocence can overcome the AEDPA statute of limitations under the "miscarriage of justice" exception to a procedural bar. A tenable actual innocence claim must persuade a district court that in light of the new evidence, it is more likely than not that no rational fact-finder would have found the petitioner guilty beyond a reasonable doubt in light of the new evidence. *Id.* at 386, 399. The untimeliness of a plea of actual innocence does bear on the credibility of the evidence offered. *Id.* at 399-400. "[A] credible claim [of actual innocence to excuse the untimeliness of a habeas petition] must be supported by new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Floyd v. Vannoy*, No. 17-30421, 2018 WL 1663749 at *6-7 (5th Cir. Apr. 6, 2018).

Evidence that was "always within the reach of [petitioner's] personal knowledge or reasonable investigation" is not new for purposes of the actual-innocence excuse for untimeliness. *Hancock v. Davis*, 906 F.3d 387, 390 (5th Cir. 2018). Petitioner has not shown that there was evidence of innocence that was unavailable to him or counsel at or before trial. *See id.* Because he has not shown the availability of new evidence not previously available, he has not shown that he is entitled to equitable tolling.

## III. RECOMMENDATION

This petition for writ of habeas corpus should be **DENIED** with prejudice as barred by the statute of limitations.

**SIGNED on this 13th day of December, 2018.**

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

## INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

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. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

# United States Court of Appeals for the Fifth Circuit

No. 19-10079

SAM JONES,

*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. 3:17-CV-1028

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before JONES, HIGGINSON, and DUNCAN, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 19-10079

SAM JONES,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeals from the United States District Court
for the Northern District of Texas

ORDER:

Sam Jones, Texas prisoner # 1787475, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application as time barred. The § 2254 application challenged Jones's conviction of aggravated assault with a deadly weapon in retaliation against a witness, prospective witness, or person who reported the occurrence of a crime. Also before the court are Jones's motion to supplement his COA motion and his motion to amend his COA motion.

When the district court has denied relief based on procedural grounds, a COA should be granted "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). Regarding the district court's procedural ruling on untimeliness, Jones argues that the district court erred in denying equitable tolling and in determining that his current § 2254 application did not relate back, pursuant to Federal Rule of Civil Procedure 15, to his earlier § 2254 application.

Reasonable jurists would not find the district court's procedural ruling concerning Rule 15 debatable or wrong. *See Slack*, 529 U.S. at 484; *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003); *Graham v. Johnson*, 168 F.3d 762, 780 (5th Cir. 1999). However, Jones has made the requisite showing for a COA regarding the denial of equitable tolling. *See Duncan v. Walker*, 533 U.S. 167, 183–84 (2001) (Stevens, J., concurring); *Slack*, 529 U.S. at 484; *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010); *Griffin v. Rogers*, 399 F.3d 626, 635–39 (6th Cir. 2005); *Rodriguez v. Bennett*, 303 F.3d 435, 438–39 (2d. Cir. 2002); *cf. Hayes v. Wilson*, 268 F. App'x 344, 351 n.7 (5th Cir. 2008). Additionally, his § 2254 application includes at least some claims that appear to facially assert a valid claim of the denial of a constitutional right. *See Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004).

Accordingly, the motion for a COA is GRANTED IN PART and DENIED IN PART. A COA is granted on the issue whether the district court abused its discretion in denying equitable tolling. A COA is denied as to the district court's procedural ruling concerning Rule 15. Jones's motion to amend his COA motion is GRANTED, and his motion to supplement his COA is DENIED. The clerk is DIRECTED to establish a briefing schedule, notify the respondent that a COA has been granted, and include the respondent in the briefing schedule.

STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 15-10927
USDC No. 3:14-CV-3134

SAMUEL LEE JONES, JR.,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

O R D E R:

Samuel Lee Jones, Jr., Texas prisoner # 1787475, was convicted by a jury of aggravated assault with a deadly weapon in retaliation and was sentenced to life in prison. He now seeks a certificate of appealability (COA) to appeal the district court's dismissal without prejudice of his 28 U.S.C. § 2254 petition challenging this conviction, as well as the denial of his motion to stay the proceedings to allow him to exhaust. Jones asserts that he should have received a stay because he was reasonably confused about his ability to refile after his first state postconviction application was dismissed for exceeding the page limit; he maintains that as a pro se litigant, he was unaware that a second application would not be dismissed as successive. He contends that it was

unjust of the trial court to refuse to consider or to grant his motion for leave to exceed the page limit. Jones argues that because a new § 2254 petition would now be untimely, the district court should have granted him a stay. Although Jones attempts to incorporate by reference various pleadings submitted in the district court, he may not do so. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

In order to obtain a COA to appeal the denial of a § 2254 petition, Jones must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. When the district court denies relief on procedural grounds, "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). Jones has not made the requisite showing. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Consequently, his motion for a COA is DENIED.

/s/Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES CIRCUIT JUDGE

**Certified as a true copy and issued as the mandate on Jun 24, 2016**

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

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