

A P P E N D I X (A)

Opinion U.S. 5th Cir. Crt. Appl

United States Court of Appeals for the Fifth Circuit

No. 21-10019

United States Court of Appeals

Fifth Circuit

FILED

February 28, 2022

GARY WAYNE WARNER,

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 Northern District of Texas
USDC No. 3:20-CV-858

ORDER:

Gary Wayne Warner, Texas prisoner # 861634, seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application challenging his life sentence for escape. The district court determined that the application was barred by the applicable statute of limitations. Warner argues that his claim of actual innocence should overcome the time bar.

Warner fails to demonstrate “that jurists of reason would find it debatable whether the [application] 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*,



Certified as a true copy and issued
as the mandate on Mar 22, 2022

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

A

A P P E N D I X (B)

Opinion of U.S. Dist Court

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

GARY WAYNE WARNER,)
ID # 861634,)
Petitioner,)
vs.) No. 3:20-CV-858-B-BH
DIRECTOR, Texas Department of Criminal)
Justice, Correctional Institutions Division,)
Respondent.) Referred to U.S. Magistrate Judge¹

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

Before the Court is the *Amended Petition for a Writ of Habeas Corpus by a Person in State Custody*, received on August 18, 2020 (doc. 15). Based on the relevant filings and applicable law, the petition should be **DENIED** with prejudice as barred by the statute of limitations.

I. BACKGROUND

Gary Wayne Warner (Petitioner), an inmate currently incarcerated in the Texas Department of Criminal Justice-Correctional Institutions Division (TDCJ-CID), filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 challenging his 1991 and 1999 convictions and sentences. (See doc. 15 at 2.) The respondent is the Director of TDCJ-CID (Respondent).

On July 25, 1991, Petitioner was convicted of aggravated assault in Cause No. F91-41758 in the 195th Judicial District Court of Dallas County, Texas, and sentenced to two years' imprisonment. (See *id.*) See <https://offender.tdcj.texas.gov/OffenderSearch> (last visited Sept. 2, 2020). He did not appeal his 1991 conviction or sentence. (See doc. 15 at 3.) He did file three state petitions for writ of mandamus: (1) the first was filed in the Fifth District Court of Appeals on January 7, 2010, and denied on February 9, 2010; (2) the second was filed in the Fifth District

¹ By Special Order No. 3-251, this habeas case has been automatically referred for findings, conclusions, and recommendation.

diligently or that an extraordinary circumstance prevented him from timely filing his petition. He has failed to meet his burden to show that he is entitled to equitable tolling.

C. Actual Innocence

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 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 and the evidence presented at trial. *Floyd v. Vannoy*, 894 F.3d 143, 155 (5th Cir. 2018) (citing *McQuiggin*, 569 U.S. at 386). The untimeliness of a plea of actual innocence does bear on the credibility of the evidence offered. *McQuiggin*, 569 U.S. 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*, 894 F.3d at 155. “This exception’s demanding standard requires ‘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.’ . . . The standard is seldom met.” *Id.* at 154-55 (citing *McQuiggin*, 569 U.S. at 401; *House v. Bell*, 547 U.S. 518, 538 (2006)).

Here, Petitioner argues that new evidence shows he is actually innocent of: (1) “[n]ot having been convicted of a felony aggravated assault-carrying a [a]ffirmative finding Warner use [sic] a deadly weapon”; and (2) “the felony habitual provision-[\$12.42(d)].” (doc. 15 at 12.) His guilty plea arguably precludes this claim. *See Roots v. Davis*, 4:17-CV-432-O, 2018 WL 6171625,

at *2 (N.D. Tex. Nov. 26, 2018) (citing *McQuiggin*, 569 U.S. at 386, and *United States v. Vanchaik-Molinar*, 195 F. App'x 262 (5th Cir. 2006) ("A voluntary guilty plea waives all non-jurisdictional defects that occurred prior to the plea and precludes consideration of a claim challenging the sufficiency of the evidence.")). Even if *McQuiggin* applies, Petitioner's factual assertions (and the April 12, 2018 state court order upon which he relies) are based on evidence that was available when he pled guilty in both cases, not new evidence. He is therefore not entitled to equitable tolling on the basis of alleged actual innocence.

III. RECOMMENDATION

The *Amended Petition for a Writ of Habeas Corpus by a Person in State Custody*, received on August 18, 2020, should be **DENIED** with prejudice as barred by the statute of limitations.

SIGNED this 28th day of September, 2020.


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

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