United States Court of Appeals for the Fifth Circuit

No. 21-50172

JOSE ANTONIO GUERRERO-YANEZ,

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. 6:18-CV-273

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges.*

PER CURIAM:

The motion for reconsideration 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.

Appendix C

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 25, 2022
Lyle W. Cayce
Clerk

No. 21-50172

JOSE ANTONIO GUERRERO-YANEZ,

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
USDC No. 6:18-CV-273

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges*.

PER CURIAM:

Jose Antonio Guerrero-Yanez, Texas prisoner # 01926789, was convicted of multiple counts of aggravated assault of a child and indecency with a child by contact and was sentenced to life in prison. He has moved for a certificate of appealability (COA) to appeal the denial of the Federal Rule of Civil Procedure 60(b)(6) motion that he filed regarding the dismissal of his 28 U.S.C. § 2254 application as time barred. To the extent that he contends that he does not require a COA to proceed, his claim is unavailing. *See Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007).

Appendix A

Guerrero-Yanez argues that he was entitled to relief under Rule 60(b) because, while his § 2254 application was untimely, the substance of his constitutional claims should have been reviewed because they were meritorious. Guerrero-Yanez suggests that the district court did not adequately explain the disposition of his Rule 60(b) motion. He also asserts that he was entitled to an evidentiary hearing on his Rule 60(b) motion.

A COA may issue if a prisoner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a COA, he must establish that reasonable jurists would find the decision to deny relief debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000), or that the issues that he raises "are adequate to deserve encouragement to proceed further," *Miller-El*, 537 U.S. at 327. To obtain a COA from the denial of a Rule 60(b) motion, he must demonstrate that reasonable jurists could debate whether the district court abused its discretion in denying him relief from the judgment. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Guerrero-Yanez has not made the required showing. Accordingly, his motion for a COA is DENIED. In the absence of the required showing for a COA, we do not reach the issue whether the district court erred by denying an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534–35 (5th Cir. 2020), *cert. denied*, 142 S. Ct. 122 (2021).

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

JOSE ANTONIO GUERRERO-YANEZ	§	
#1926789	§	
	§	
V.	§	**W-18-CA-273-ADA**
	§	
LORIE DAVIS	§	

FINAL JUDGMENT

Before the Court is the above styled and numbered cause. On this date, the Court dismissed as time-barred Petitioner Jose Antonio Guerrero-Yanez'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 Jose Antonio Guerrero-Yanez'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 January 30, 2019

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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

JOSE ANTONIO GUERRERO-YANEZ	§	
#1926789	§	
	§	
V.	§	**W-18-CA-273-ADA**
	§	
LORIE DAVIS	§	

ORDER

Before the Court is Petitioner's Petition For a Writ of Habeas Corpus by a Person in State Custody (#1), Respondent's Amended Response (#12), and Petitioner's Reply (#13). Petitioner is proceeding pro se and in forma pauperis. For the reasons set forth below, Petitioner's application for writ of habeas corpus is dismissed with prejudice as time-barred.

Procedural History

Petitioner was found guilty by a jury and, on March 21, 2014, sentenced to life imprisonment. Petitioner appealed and on April 28, 2016, the Seventh Court of Appeals of Texas affirmed his conviction. *Guerrero Yanez v. State*, No. 07-14-00143-CR, 2016 WL 2343907 (Tex. App.—Amarillo 2016, pet. ref'd). Petitioner subsequently filed a petition for discretionary review which the Texas Court of Criminal Appeals refused on August 24, 2016. Petitioner filed a state habeas corpus application on May 24, 2017, which was denied by the Texas Court of Criminal Appeals on October 4, 2017. Petitioner filed a petition for writ of certiorari with the United States Supreme Court on December

Appendix B

27, 2017, which was denied on March 19, 2018. Petitioner signed his federal habeas application on September 19, 2018.

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:

> (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 November 22, 2016, when the period for timely filing a petition for writ of certiorari appealing his conviction expired. *See Roberts v. Cockrell*, 319 F.3d 690, 693–95 (5th Cir. 2003) (finality determined by expiration of time for filing further appeals); Sup. Ct. R. 13.1 (a petition for a writ of certiorari to review a judgment entered by a state court of last resort is

timely when it is filed within 90 days after entry of the judgment). Therefore, Petitioner had until November 22, 2017, to timely file his federal application. Petitioner did not execute his federal application for habeas corpus relief until September 19, 2018, nearly 10 months after the limitations period had expired.

Petitioner's state application tolled the limitations period while it was pending from May 24, 2017, until it was denied on October 4, 2017. It was unclear, from Petitioner's petition or Respondent's initial answer, what effect Petitioner's petition for writ of certiorari had on the limitations period, if any. Respondent filed an amended answer, however, explaining that the petition for writ of certiorari sought review of the denial of Petitioner's state habeas petition. Such a filing does not continue to toll the limitations period. *See Lawrence v. Florida*, 549 U.S. 327, 332 (2007) (explaining that the application for state postconviction review is not "pending" after the state court's postconviction review is complete, and § 2244(d)(2) does not toll the 1–year limitations period during the pendency of a petition for certiorari). Thus, following the denial of his state application, Petitioner's federal limitations period expired on April 5, 2018, notwithstanding his petition for writ of certiorari. Petitioner did not execute his federal application until September 19, 2018, and thus, Petitioner's application is time-barred.

To the extent Petitioner is alleging 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 fails to assert any facts that would entitle him to equitable tolling.

Petitioner may also be asserting 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).

Petitioner pleads actual innocence and argues that certain witnesses lied at trial. However, Petitioner's claims do not provide any new evidence supporting a claim of actual innocence. Petitioner has made no valid attempt to show he was actually innocent of the crime for which was convicted, nor has he provided any new or reliable evidence indicating 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.

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.

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 January 30, 2019

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE