APPENDIX-A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 7, 2023
Lyle W. Cayce
Clerk

No. 23-40053

DANIEL LEE REED,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Eastern District of Texas
USDC No. 6:19-CV-432

ORDER:

Daniel Lee Reed, Texas prisoner # 02040919, moves for a certificate of appealability (COA) to appeal the dismissal, as an unauthorized successive 28 U.S.C. § 2254 application, of his postjudgment motion under Federal Rule of Civil Procedure 60(b). In his COA motion, he argues the district court erred in recharacterizing his Rule 60(b) motion as an unauthorized successive application because he was not raising a new claim or attacking any prior adjudication of his claims on the merits. Rather, Reed asserts that he was raising a defect in the district court's prior dismissal of his § 2254

application as time barred. *See Gonzalez v. Crosby*, 545 U.S. 524, 531–32 (2005).

A COA will issue in relation to the denial of Reed's Rule 60(b) motion only if he "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To make that showing, Reed must demonstrate that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that the issues presented were adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Reed fails to make the requisite showing, and his motion for a COA is DENIED. Reed's motion for leave to proceed in forma pauperis on appeal is likewise DENIED.

CORY T. WILSON
United States Circuit Judge

APPENDIX-B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

DANIEL LEE REED,	§	
	§	
Petitioner,	§	
	§	
v.	§	Case No. 6:19-cv-432-JDK-JDL
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	
	§	

ORDER DENYING RELIEF FROM FINAL JUDGMENT

Before the Court is Petitioner Daniel Lee Reed's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). Docket No. 37. Petitioner asserts that his trial counsel was ineffective for failing to investigate the novel defense of "sexomia" as it applies to his criminal charge for aggravated sexual assault of a child under the age of 6. He also challenges the Court's Final Judgment that Petitioner's 28 U.S.C. § 2254 federal writ of habeas corpus proceeding was time barred pursuant to the one-year statute of limitations of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996. Pub. L. 104-132, 110 Stat. 1217.

A. Background

This action was referred to United States Magistrate Judge John D. Love, who issued a Report and Recommendation (Docket No. 20) in which he recommended that the Court deny Petitioner's § 2254 habeas petition as time barred and dismiss this action with prejudice. The Magistrate Judge also recommended that a certificate of

appealability be denied sua sponte. Petitioner timely filed objections. Docket No. 22. After conducting a de novo review, the Court concluded that the findings and conclusions of the Magistrate Judge were correct, overruled the objections, adopted the Report, denied Petitioner's habeas petition as time barred, and dismissed the case with prejudice. The court also denied a certificate of appealability sua sponte. Docket Nos. 23, 24.

Plaintiff filed a notice of appeal with the United States Court of Appeals for the Fifth Circuit challenging the court's entry of Final Judgment on basis that his habeas petition was time barred. Docket No. 25. Ultimately, the Fifth Circuit denied Petitioner's motion for COA and affirmed the court's Final Judgment. Docket Nos. 33, 34. Petitioner next applied for a writ of certiorari with the United States Supreme Court. Petitioner's application for writ of certiorari was denied. Docket No. 36. Petitioner now seeks relief from the judgment in this Court pursuant to Rule 60(b)(6).

B. Discussion

Under Rule 60(b), the movant must show that he is entitled to relief from judgment because of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misconduct, or misrepresentation of an adverse party; (4) that the judgment is void; (5) that the judgment has been satisfied; or (6) any other reason justifying the granting of relief from the judgment.

A district court has jurisdiction to consider a Rule 60 motion in habeas proceedings so long as the motion "attacks, not the substance of the federal court's resolution of the claim on the merits, but some defect in the integrity of the federal

habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A motion that seeks to add a new ground for relief or attack the previous resolution of a claim on the merits is, in fact, a successive petition subject to the standards of 28 U.S.C. § 2244(b). *Id.* at 531-32; *see also Will v. Lumpkin*, 978 F.3d 933 (5th Cir. 2020) (a Rule 60(b) motion constitutes a successive habeas petition when it attacks a judgment on the merits of a previously filed petition). Because Petitioner's Rule 60(b) motion raises new claims and attacks the Court's previous adjudication of his constitutional challenges, it must be dismissed as successive under 28 U.S.C. § 2244.

Petitioner, furthermore, fails to allege or show that the Fifth Circuit has granted him permission to file a successive habeas petition as dictated by 28 U.S.C § 2244(b)(3)(A). Therefore, the Court lacks jurisdiction to consider Petitioner's Rule 60(b) motion. *Uranga v. Davis*, 879 F.3d 646, 648 n.3 (5th Cir. 2018) (holding that the court lacks jurisdiction to consider the present motion unless leave to file the same is granted by the Fifth Circuit); *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (explaining that § 2244(b)(3)(A) "acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition" until the appellate court has granted petitioner permission to file one).

Moreover, to the extent Petitioner seeks relief in the form of setting aside the judgment and reopening the case in order for the court to reconsider the recommendations in the Report, the Court would still agree with the Magistrate Judge's findings and conclusions that Petitioner's § 2254 habeas petition is untimely.

Accordingly, the Court **DISMISSES** Petitioner's Rule 60(b) motion (Docket No. 37) for want of jurisdiction. A certificate of appealability is **DENIED** sua sponte. All motions not previously ruled on are **DENIED**.

So **ORDERED** and **SIGNED** this **4th** day of **January, 2023.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

APPENDIX-C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

DANIEL LEE REED, #2040919,	§	
	§	
Petitioner,	§	
	§	
v.	§	Case No. 6:19-cv-432-JDK-JDL
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

ORDER ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Petitioner Daniel Lee Reed, a Texas Department of Criminal Justice inmate proceeding pro se, filed this federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to United States Magistrate Judge John D. Love for findings of fact, conclusions of law, and recommendations for disposition.

On March 5, 2021, Judge Love issued a Report and Recommendation recommending that the Court deny the petition and dismiss the case with prejudice as time barred. Judge Love also recommended that a certificate of appealability be denied. Docket No. 20. Petitioner objected. Docket No. 22.

Where a party objects within fourteen days of service of the Report and Recommendation, the Court reviews the objected-to findings and conclusions of the Magistrate Judge de novo. 28 U.S.C. § 636(b)(1). In conducting a de novo review, the Court examines the entire record and makes an independent assessment under the law. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superseded on other grounds by statute*, 28 U.S.C. § 636(b)(1) (extending the

time to file objections from ten to fourteen days).

Petitioner's objections merely repeat his original contention that he should be afforded equitable tolling because his habeas attorney intentionally deceived him about his federal filing deadlines. Docket No. 22. Petitioner offers no evidence of this alleged deception, only conclusory statements. *Id.*

Having conducted a de novo review of the Report and the record in this case, the Court has determined that the Report of the United States Magistrate Judge is correct, and Petitioner's objections are without merit. The Court therefore **OVERRULES** Petitioner's objections (Docket No. 22) and **ADOPTS** the Report and Recommendation of the Magistrate Judge (Docket No. 20) as the opinion of the District Court. Petitioner's petition for habeas corpus is hereby **DISMISSED WITH PREJUDICE** as time barred. Further, the Court **DENIES** a certificate of appealability.

So **ORDERED** and **SIGNED** this **24th** day of **March, 2021.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

DANIEL LEE REED, #2040919,	§	
	§	
Petitioner,	§	
	§	
v.	§	Case No. 6:19-cv-432-JDK-JDL
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

The Court, having considered Petitioner's case and rendered its decision by opinion issued this same date, hereby enters **FINAL JUDGMENT.**

It is **ORDERED** that this petition for a writ of habeas corpus is **DISMISSED WITH PREJUDICE.** A certificate of appealability is **DENIED.** All pending motions are **DENIED** as **MOOT.**

The Clerk of Court is instructed to close this case.

So **ORDERED** and **SIGNED** this **24th** day of **March, 2021.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

DANIEL LEE REED #2040919	§ §	
VS.	§ §	CIVIL ACTION NO. 6:19cv432
DIRECTOR, TDCJ-CID	§ §	

REPORT AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE

Petitioner Daniel Lee Reed, an inmate confined in the Texas prison system, proceeding *pro se*, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his 2015 Smith County conviction. The petition was referred for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Upon review, for the reasons stated herein, the Court recommends that the petition be denied, and the case dismissed with prejudice. The Court further recommends that Petitioner Reed be denied a certificate of appealability *sua sponte*.

I. Procedural History

Reed was charged with aggravated sexual assault of a child under six years of age in case number 114-0833-15, in the 114th District Court of Smith County, Texas. (Dkt. #1 at 2.) He pleaded not guilty but was found guilty by a jury and sentenced to life imprisonment on December 3, 2015. *Id.* Reed appealed his conviction, which was affirmed by the Twelfth Court of Appeals of Texas on August 17, 2016. *Id.* at 3. The Texas Court of Criminal Appeals ("TCCA") refused his petition for discretionary review on February 15, 2017. *Id.*

On April 9, 2018, Reed filed his state habeas application, through counsel, challenging his conviction. *Id.* at 4. The TCCA denied the application on May 8, 2019, without written order on the findings of the trial court and without a hearing. *Id.* He did not file a writ of certiorari with the United States Supreme Court.

Reed filed his federal habeas petition on September 16, 2019. *See Spotville v. Cain*, 149 F.3d 374, 378 (5th Cir. 1998) (holding that for purposes of determining the applicability of the AEDPA, a federal petition is filed on the date it is placed in the prison mail system).

II. Reed's Petition

In his petition, Reed raises several claims for relief:

(1) The trial court erred in not including in the jury charge a lesser-included offense of indecency with a child;

(2) The trial court shared with the State a letter received from Reed which discussed Reed's attorney, and the court conducted a public hearing, creating "an irreparable rupture" between Reed and his attorney;

(3) He was denied effective assistance of counsel at trial due to trial counsel's actions and treatment of Reed;

(4) He was denied effective assistance of counsel at trial when counsel "revealed [Reed]'s version of the facts to counsel for the State, prior to trial, without [Reed]'s permission;"

(5) He was denied effective assistance of counsel at trial because counsel failed to conduct an independent investigation, and instead relied upon the State's investigation;

(6) He was denied effective assistance of counsel at trial because counsel failed to prepare Reed for testifying; and

(7) He was denied effective assistance of counsel at trial because counsel did not consult an expert or call an expert to testify.

(Dkt. #1 at 6–10.)

Reed argues that he received newly discovered evidence which proves his innocence. (Dkt. #1 at 22.) He claims that the victim wrote letters which he describes as "recantations" her allegations against him. Reed also states that while he did not possess these letters at trial, his trial attorney knew of their substance and had she investigated the victim's recantations, the trial would likely have had a different outcome. *Id.*

Reed alternatively seeks an evidentiary hearing on the substance of his federal habeas petition, a new trial, or to have his conviction overturned (Dkt. #1 at 23.)

III. Respondent's Answer

After being ordered to do so, Respondent filed an answer addressing Reed's petition. (Dkt. #12.) Respondent maintains that Reed's petition is barred by the statute of limitations. *Id.* at 7–9. Respondent also asserts that Reed is not entitled to equitable tolling and that his untimeliness is not excused by his claim of actual innocence. *Id.* at 9, 15–16. Respondent contends that Reed was not diligent in pursuing his rights as he could have filed a protective petition, regardless of his attorney's actions. *Id.* at 14.

IV. Reed's Response

In his response, Reed argues that he has pursued his rights diligently and is entitled to equitable tolling because he had been communicating with his habeas attorney. (Dkt. #15 at 2.) He contends that he has demonstrated extraordinary circumstances worthy of equitable tolling. *Id.* at 3. He states that his attorney told him that they had enough time to file a federal habeas petition but later lied and said that according to newly discovered case law, that the time had run to file the petition. *Id.* Reed contends that this was a lie because he cannot find the case law his attorney referenced and construes his attorney's behavior as "abandonment by intentional misrepresentations intended to deceive." *Id.* at 3–4. Because he relied on his attorney's original

statements that there was time to file, Reed argues that this supposed deceit by his attorney is an extraordinary circumstance warranting equitable tolling. *Id.* at 4–5.

V. Legal Standards

1. Federal Habeas Review

The role of federal courts in reviewing habeas petitions filed by state prisoners is exceedingly narrow. A prisoner seeking federal habeas corpus review must assert a violation of a federal constitutional right; federal relief is unavailable to correct errors of state constitutional, statutory, or procedural law unless a federal issue is also present. *See Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993); *see also Estelle v. McGuire*, 503 F.3d 408, 413 (5th Cir. 2007) ("We first note that 'federal habeas corpus relief does not lie for errors of state law.'") (internal citation omitted). When reviewing state proceedings, a federal court will not act as a "super state supreme court" to review error under state law. *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007).

Federal habeas review of state court proceedings is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. Pub. L. 104-132, 110 Stat. 1217. Under the AEDPA, which imposed several habeas corpus reforms, a petitioner who is in custody "pursuant to the judgment of a State court" is not entitled to federal habeas relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> 1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established law, as determined by the Supreme Court of the United States; or
>
> 2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d).

The AEDPA imposes a "highly deferential standard for evaluating state court rulings," which demands that federal courts give state court decisions "the benefit of the doubt." *See Renico*

v. Lett, 559 U.S. 766, 773 (2010) (internal citations omitted); *see also Cardenas v. Stephens*, 820 F.3d 197, 201-02 (5th Cir. 2016) ("Federal review under the AEDPA is therefore highly deferential: The question is not whether we, in our independent judgment, believe that the state court reached the wrong result. Rather, we ask only whether the state court's judgment was so obviously incorrect as to be an objectively unreasonable resolution of the claim."). Given the high deferential standard, a state court's findings of fact are entitled to a presumption of correctness and a petitioner can only overcome that burden through clear and convincing evidence. *Reed v. Quarterman*, 504 F.3d 465, 490 (5th Cir. 2007).

VI. Discussion and Analysis

1. Timeliness under the AEDPA

As Respondent indicates, Reed's federal petition is time-barred by virtue of the statute of limitations under the AEDPA. Congress enacted the AEDPA 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 Reed 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). An inmate must file a section 2254 motion within one year of 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.

See id. § 2244(d)(1)(A)-(D).

Generally, a case is final when a judgment of conviction is entered, the availability of an appeal is exhausted, and the time for filing a petition for certiorari has lapsed or the certiorari petition is actually denied. *See Roberts v. Cockrell*, 319 F.3d 690, 693–95 (5th Cir. 2003) (explaining that finality is determined by expiration of time for filing further appeals).

Moreover, the time period for filing a timely petition is tolled while a state habeas application, post-conviction motion, or other application for collateral review is pending. *See* 28 U.S.C. § 2244(d)(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 pending shall not be counted toward any period of limitation under this subsection.").

Here, Reed was sentenced on December 3, 2015, and his conviction was affirmed on August 17, 2016. (Dkt. #1 at 3.) TCCA refused his petition for discretionary review on February 15, 2017, and he did not file a petition for writ of certiorari with the Supreme Court. *Id.* Therefore, his conviction became final ninety days later on May 16, 2017 – when the time for filing a petition with the Supreme Court expired. See *Roberts*, 319 F.3d 693–94. The one-year limitations period under the AEDPA began to run on May 17, 2017—one day after time period for filing with the Supreme Court expired.

Reed filed his state habeas application challenging his conviction on April 9, 2018 –327 days after the limitations period began to run, and the TCCA denied that application on May 8, 2019. The pendency of Reed's state application tolled the federal limitations period for 395 days and extended Reed's deadline for filing his federal petition to June 15, 2019.

Although the AEDPA provides four possible dates on which the limitation period may begin to run, the date on which the judgment became final is the only one relevant here. Reed had until June 15, 2019, to file his federal habeas petition; however, he filed his section 2254 petition on September 16, 2019 – three months after the expiration of the limitation period. It is therefore untimely and barred by the statute of limitations—absent any tolling.

2. Equitable Tolling

Reed is not entitled to equitable tolling. Under the AEDPA, the one-year statute of limitations period may be equitably tolled only if the petitioner demonstrates that (1) "he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing. *See Holland v. Florida*, 560 U.S. 631, 649 (2010); *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013). Furthermore, the doctrine of equitable tolling is available in only the most rare and exceptional circumstances, particularly when the plaintiff is "actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *See Flores v. Quarterman*, 467 F.3d 484, 486 (5th Cir. 2000) (quoting *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (overturned on other grounds)). The Supreme Court has reaffirmed "that the second prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016) (emphasis in original).

Here, Reed does not show or point to any extraordinary circumstances that stood in his way so that he could file his petition timely. In his response to the issue of timeliness, Reed contends that he is entitled to equitable tolling because he missed the filing deadline due to attorney error. Reed claims that his state habeas attorney first told him that there was time to file his federal petition, but later informed him that due to previously unknown case law, the attorney discovered

that the time had run to file the federal petition. (Dkt. # 1 at 17.) Reed contends that this change in legal opinion was both negligence and intentional deception. (Dkt. #1 at 18; 15 at 4–6.) He argues that this misinformation on the part of his attorney constitutes an extraordinary circumstance warranting equitable tolling. (Dkt. # 1 at 20–21.)

Both the Supreme Court and the Fifth Circuit have repeatedly explained that equitable tolling does not apply to normal situations of attorney negligence. *Holland*, 560 U.S. at 651–52; *Coleman v. Johnson*, 148 F.3d 398, 402 (5th Cir. 1999). Miscalculation of filing deadlines, as in this case, is considered to be one of these normal situations of negligence. Indeed, "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007); *see also Tsolainos v. Cain*, 540 F. App'x 394, 399-400 (5th Cir. 2013).

The Fifth Circuit has found tolling to only be appropriate in two distinct, rare situations: "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." *Coleman v. Johnson,* 148 F.3d 398, 402 (5th Cir. 1999). Reed argues that because he relied on his attorney's original opinion that there was time to file his federal petition, his attorney's later realization that the time period had run should be considered an extraordinary circumstance as "abandonment by deceitful and intentional misrepresentations." (Dkt. #15 at 4–6.)

In labeling his attorney's actions as abandonment, he describes his situation as akin to that of *Maples v. Thomas*. 565 U.S. 266 (2012). In *Maples*, during the state post-conviction phase, the defendant's pro bono attorneys left their employment at their law firm and discontinued representation of the defendant without informing either the defendant or the court. *Id.* at 274–75.

No other attorney at the firm took responsibility for the case in any way, and local counsel did not act upon receiving a copy of the dismissal. *Id.* at 275–77. As a result, the time to file an appeal in the state court expired. *Id.* at 277. The district court determined that the procedural error precluded federal habeas consideration, and the Eleventh Circuit affirmed. *Id.* at 279. The Supreme Court reversed, distinguishing attorney abandonment, which satisfies the "cause" requirement to relieve a petitioner from the consequences of a procedural default in state court, from attorney negligence, which does not. *Id.* at 282–90; *see also Jimenez v. Hunter*, 741 F. App'x 189, 192 (5th Cir. 2018) (declining to express a view on whether attorney wrongdoing must amount to effective abandonment for it to constitute extraordinary circumstances warranting equitable tolling).

Reed's contention is misplaced. First, the Court notes that *Maples* addressed the issue of "cause" for purposes of overcoming state procedural default, rather than equitable tolling, the principle involved herein, and thus is not dispositive. Moreover, here there is no evidence that Reed's counsel actually abandoned him. Unlike in *Maples* where the defendant had no way to know that his attorney had discontinued representation, Reed's attorney continued to communicate with him throughout his representation. Reed's conclusory allegations that his attorney's miscalculation was both intentional and deceitful are also insufficient to establish that his attorney abandoned him. Reed's counsel was a state habeas practitioner and his failure to accurately calculate the filing deadline for a federal habeas petition cannot reasonably be construed to constitute the total abandonment by counsel as in *Maples*. Accordingly, Reed has failed to establish that he suffered extraordinary circumstances sufficient to warrant equitable tolling.

Respondent correctly argues that Reed is not entitled to equitable tolling for other reasons as well. In its answer, Respondent asserts that Reed should be denied equitable tolling because he did not diligently pursue his rights. (Dkt. #12 at 12–15.) "In order for equitable tolling to apply,

the applicant must diligently pursue his § 2254 relief." *Coleman*, 184 F.3d at 403. Reed argues that his correspondence with his attorney shows his diligence in pursuing his rights, however, the record demonstrates otherwise because he waited nearly eleven months to file his state habeas petition after his conviction was affirmed and then waited another four months before filing the instant petition after the denial of his state petition. *See Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) ("We have stated that equity is not intended for those who sleep on their rights.")

Respondent is also correct that the fact that Reed hired state habeas counsel did not relieve him of the duty to ensure that he timely filed a federal petition. Nor does Reed's contention that he missed the filing deadline due to attorney error. "[P]etitioners seeking to establish due diligence must exercise diligence even when they receive inadequate legal representation. . . . ineffective assistance of counsel is irrelevant to the tolling decision because a prisoner has no right to counsel during post-conviction proceedings." *Manning v. Epps*, 688 F.3d 177, 185 (5th Cir. 2012) (citations omitted).

Reed has neither demonstrated that he has been actively pursuing his rights nor that some extraordinary circumstances stood in his way. The Court does not find these situations rare or extraordinary circumstances. *See Mathis*, 616 F.3d at 474 ("We have stated that equity is not intended for those who sleep on their rights.") (internal citation and quotations omitted). Accordingly, Reed is not entitled to equitable tolling and his habeas petition should be dismissed as time barred.

3. Actual Innocence

In his complaint, Reed avers that he is actually innocent due to what he claims is the victim's recantation. (Dkt. #1 at 22.) He argues that letters from the victim recanting her allegations were not available at Reed's trial but became available after his direct appeal. *Id.* Reed claims that

the letters line up with his version of the facts – facts that he had wanted his trial attorney to investigate and pursue as a defense. He also claims that had his trial attorney conducted an investigation, there likely would have been a different outcome at trial. *Id.* at 23.

To the extent that Reed brings an actual innocence claim, the Court notes that such an argument fails. Actual innocence, if proven, "serves as a gateway through which the petitioner may pass whether the impediment is a procedural bar ... or, as in this case, expiration of the statute of limitations." *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). In this way, the Supreme Court explained that tenable actual-innocence gateway pleas are rare; a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. *Id.* (*citing Schlup v. Delo*, 513 U.S. 298, 329 (1995) (claim of actual innocence requires the petitioner to support his allegations of constitutional error with new reliable evidence, whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence which was not presented at trial)).

Here, Reed has not set forth a claim of actual innocence sufficient to serve as a gateway to avoid the operation of the statute of limitations. First, it is important to note that the letters he relies on to support his claim are not actually before the Court. That alone would be sufficient to find that he has failed to present new, reliable evidence on which to base a claim of actual innocence.

Next, although he states that the letters are "recantations," from the way Reed describes the contents of the letters, it seems that they merely repeat the version of the facts that Reed wanted to present at trial. Reed does not claim that the victim withdrew her accusations or averred that the state's allegations against him were false. A recitation of Reed's version of the facts is not new evidence sufficient to support a claim of actual innocence. "New evidence" is evidence that was not

presented at trial, and remained unknown to the prosecution, defense, and fact finder throughout the trial. *Floyd v. Vannoy*, 894 F.3d 143, 156 (5th Cir. 2018) (citing *Schlup v. Delo*, 513 U.S. 298 339 (1995) (claim of actual innocence requires the petitioner to support his allegations of constitutional error with new reliable evidence, whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence which was not presented at trial); *see also House v. Bell*, 547 U.S. 518, 538 (2006) (emphasizing that the *Schlup* standard is "demanding" and seldom met). Furthermore, even if the victim did recant her accusations, the Fifth Circuit has repeatedly established that "recanting affidavits and witnesses are viewed with extreme suspicion by the courts." *Spence v. Johnson*, 80 F.3d 898, 1003 (5th Cir. 1996); *accord United States v. Gresham*, 118 F.3d 258, 267 (5th Cir. 1997); *Baldree v. Johnson*, 99 F.3d 659, 663 (5th Cir. 1996).

Finally, given the young age of the victim and the fact that she is Reed's grandchild, the Court is not convinced of the reliability of these letters. The victim was four years old when the abuse occurred, and she would have been at most eight years old when Reed learned about the letters. Without knowing exactly when the letters were written, the Court can only assume that the victim was between four and eight at the time. Even if she was on the older end of that age range, the victim was simply not old enough to credibly deny that Reed sexually abused her—sexual abuse the Court notes was proven at trial through DNA evidence. *See* Dkt. #12 at 5. The Court also notes that at trial the victim's parents and grandparents seemed to blame the child for Reed's arrest. *Id.* They testified that the four-year-old "acted out sexually" and "was advanced for her age regarding sexual matters" due to the fact that her parents exposed the child to the pornography and their own sexual activity. *Id.* Given this home environment, it is reasonable to believe that the victim may have been pressured into "recanting." Accordingly, the Court cannot lend any credibility to these "recantations" and cannot say that in light of these letters, that no reasonable juror would have found Reed not guilty beyond a reasonable doubt.

For the reasons above, Reed fails to provide "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial court," or otherwise present evidence to show he was deprived of a trial "free of nonharmless constitutional error." *See McQuiggin*, 569 U.S. at 401. He has not presented a sufficient basis for the Court to conclude that he was actually innocent. This claim should be dismissed.

VII. Conclusion

Reed's criminal conviction became final on May 16, 2017. The deadline to file his federal habeas petition was June 15, 2019. His September 16, 2019 petition is therefore untimely. Moreover, Reed is not entitled to equitable tolling and his claim of actual innocence is without merit.

VIII. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, under 28 U.S.C. § 2253(c)(1), he must first obtain a certificate of appealability ("COA") from a circuit justice or judge. *Id.* Although Reed has not yet filed a notice of appeal, the court may address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

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). To make a substantial showing, the

petitioner need only show 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 v. Cockrell*, 537 U.S. 322, 327 (2003). The Supreme Court recently emphasized that the COA inquiry "is not coextensive with merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. 773 (quoting *Miller-El*, 537 U.S. at 336). Moreover, "[w]hen the district court denied relief on procedural grounds, the petitioner seeking a COA must further show that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012)).

Here, Reed failed to present a substantial showing of a denial of a constitutional right or that the issues he has presented are debatable among jurists of reason. He has also failed to demonstrate that a court could resolve the issues in a different manner of that questions exist warranting further proceedings. Accordingly, he is not entitled to a certificate of appealability.

RECOMMENDATION

For the foregoing reasons, it is recommended that Petitioner Reed's federal habeas petition be denied, as time-barred, and the case dismissed with prejudice. Finally, it is recommended that Petitioner Reed be denied a certificate of appealability *sua sponte*.

Within fourteen (14) days after service of the Magistrate Judge's Report, any party must serve and file specific written objections to the findings and recommendations of the Magistrate Judge. 28 U.S.C. § 636(b)(1)(C). 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 report 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 party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 5th day of March, 2021.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE