



United States Court of Appeals for the Fifth Circuit

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

No. 23-10166

United States Court of Appeals
Fifth Circuit

FILED

May 3, 2023

Lyle W. Cayce
Clerk

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,*
Correctional Institutions Division; STATE OF TEXAS,

Respondents—Appellees.

Application for Certificate of Appealability
the United States District Court
for the Northern District of Texas
USDC No. 3:22-CV-2911

ORDER:

Arthur Vasquez, Texas prisoner # 1772951, was convicted of murder and received a 40-year prison sentence. He now seeks a certificate of appealability (COA) to appeal the district court's dismissal as untimely of his 28 U.S.C. § 2254 application challenging this conviction. Vasquez asserts that he is actually innocent and that the district court's failure to consider the merits of his constitutional claims warrants reversal. In addition, he maintains that the district court used an incorrect standard in denying him a COA. Although Vasquez also contends that he is relying on newly


"APPENDIX A"

No. 23-10166

discovered evidence, that application of the limitations period violates his right to redress grievances, and that the district court unreasonably delayed in ruling on his § 2254 application, he did not raise these allegations in the district court, and they will not be considered. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018); *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

To obtain a COA, Vasquez must make “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). Where, as here, the district court’s denial of federal habeas relief is based on procedural grounds, this court will issue a COA “when the prisoner shows, at least, 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*, 529 U.S. at 484. Vasquez has not met this standard.

Accordingly, Vasquez’s motion for a COA is DENIED. His motions for leave to proceed in forma pauperis on appeal and for judicial notice are likewise DENIED.


EDITH BROWN CLEMENT
United States Circuit Judge

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

ARTHUR VASQUEZ,
TDCJ No. 1772951,

Petitioner,

V.

STATE OF TEXAS,

Respondent.

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No. 3:22-CV-2911-D

ORDER

I

The United States Magistrate Judge made findings, conclusions, and a recommendation ("FCR") in this case on January 3, 2023. On January 20, 2023 petitioner Arthur Vasquez ("Vasquez") filed objections and a notice of appeal of the FCR. He filed motions for leave to appeal *in forma pauperis* on January 20 and 26, 2023.

Because Vasquez's appeal is taken from the FCR of the magistrate judge, which is an unappealable order, the notice does not deprive this court of jurisdiction to adopt the FCR of the magistrate judge.

II

The undersigned district judge has reviewed *de novo* those portions of the FCR to which objections have been made and has reviewed the remaining portions for plain error. Finding no error, the court adopts the findings, conclusions, and

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

ARTHUR VASQUEZ,
TDCJ No. 1772951,

Petitioner,

V.

STATE OF TEXAS,

Respondent.

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No. 3:22-cv-2911-D-BN

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

Arthur Vasquez, a Texas prisoner proceeding *pro se*, submitted filings referencing state criminal numbers W10-62372-T(A) and W10-62372-T(B) and requesting expedited relief under 28 U.S.C. §§ 2241, 2243, 2253, and 2254. *See* Dkt. Nos. 3, 4, 5.

Senior United States District Judge Sidney A. Fitzwater referred Vasquez's filings to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference.

Vasquez's filings should together be construed as a *pro se* application for a writ of habeas corpus under 28 U.S.C. § 2254 collaterally attacking his 2012 Dallas County conviction for murder, which resulted in a sentence of 40 years of incarceration. *See State v. Vasquez*, F-1062372-T (283d Jud. Dist. Ct., Dall. Cnty., Tex. Feb. 24, 2012), *appealed dismissed for want of jurisdiction*, No. 05-12-00354-CR, 2012 WL 3764923 (Tex. App. – Dallas Aug. 30, 2012, pet. ref'd).

And the undersigned enters these findings of fact, conclusions of law, and

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recommendation that, under the circumstances here and for the reasons and to the extent set out below, the Court should dismiss the federal habeas challenge under Rule 4 of the Rules Governing Section 2254 Cases (Habeas Rule 4).

Legal Standards

Habeas Rule 4 allows a district court to summarily dismiss a habeas application “if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” *Id.*; see also *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (“This rule differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses. The district court has the power under [Habeas] Rule 4 to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state. This power is rooted in “the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer.” (quoting 28 U.S.C. foll. § 2254 Rule 4 Advisory Committee Notes)).

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

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

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) “introduced both ‘simple logic’ to the federal habeas landscape and uniform rules for federal courts to apply.” *Wallace v. Mississippi*, 43 F.4th 482, 492 (5th Cir. 2022) (quoting *Smith v. Titus*, 141 S. Ct. 982, 987 (2021) (Sotomayor, J., dissenting from denial of cert.), then citing *Day*, 547 U.S. at 202 n.1).

“Namely, it implemented a host of greatly needed procedural requirements for petitioners seeking habeas relief.” *Id.* (citing *Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022) (“In many ways, the statute represented a sea change in federal habeas law.”)). One such requirement is “the one-year period for an individual in custody pursuant to a state-court judgment to file a § 2254 petition for habeas relief” that “begins running from the latest of four events.” *Id.* at 497 (citing 28 U.S.C. § 2244(d)):

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United

States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

The time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the limitations period. *See id.* § 2244(d)(2).

The one-year limitations period is also subject to equitable tolling – “a discretionary doctrine that turns on the facts and circumstances of a particular case,” *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999), and only applies in “rare and exceptional circumstances,” *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)). “[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.’” *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

Taking the second prong first, “[a] petitioner’s failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner’s own making do not qualify.” *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th

Cir. 2009) (per curiam) (citation omitted). This “prong of the equitable tolling test is met only where the circumstances that caused a litigant’s delay are both extraordinary *and* beyond [the litigant’s] control.” *Menominee Indian Tribe*, 577 U.S. at 257.

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

A showing of “actual innocence” can also overcome AEDPA’s statute of limitations. See *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). But the actual innocence gateway is only available to a petitioner who presents “evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.” *Id.* at 401 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)). That is, the petitioner’s new, reliable evidence must be enough to persuade the Court that “no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* at 386 (quoting *Schlup*, 513 U.S. at 329); see also *Johnson v. Hargett*, 978 F.2d 855, 859-60 (5th Cir. 1992) (“The Supreme Court has made clear that the term ‘actual innocence’ means *factual*, as opposed to *legal*, innocence – ‘legal’ innocence, of course, would arise whenever a constitutional violation by itself requires reversal, whereas ‘actual’ innocence, as the Court stated in *McCleskey [v. Zant]*, 499 U.S. 467

(1991)], means that the person did not commit the crime.” (footnotes omitted)); *Acker v. Davis*, 693 F. App’x 384, 392-93 (5th Cir 2017) (per curiam) (“Successful gateway claims of actual innocence are ‘extremely rare,’ and relief is available only in the ‘extraordinary case’ where there was ‘manifest injustice.’” (quoting *Schlup*, 513 U.S. at 324, 327)).

Analysis

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

Here, the Dallas Court of Appeals dismissed Vasquez’s direct appeal on the basis that his “waiver of his right to appeal deprives us of jurisdiction to address [Vasquez’s] complaint.” *Vasquez*, 2012 WL 3764923, at *1.

Vasquez nevertheless petitioned the Texas Court of Criminal Appeals (the CCA) for discretionary review, which the CCA refused. *See Vasquez v. State*, PD-1291-12 (Tex. Crim. App. Mar. 20, 2013). But there is no record that Vasquez then petitioned the United States Supreme Court for certiorari review. Vasquez then waited until 2018 to seek state habeas relief. *See Ex parte Vasquez*, W10-62372-T(A) (283d Jud. Dist. Ct., Dall. Cnty., Tex. (application decl. signed June 29, 2018)); *Ex parte Vasquez*, WR-54,231-02 (Tex. Crim. App. Feb. 13, 2019) (state habeas

application denied without written order on trial court's findings without a hearing).

Consequently, the Court need not consider the impact of Vasquez's appellate waiver on when the state criminal judgment became final for AEDPA purposes to find that the Section 2254 application is untimely. *See, e.g., Oliver v. Davis*, No. 3:18-cv-546-N-BN, 2018 WL 2773378, at *3-*4 (N.D. Tex. Apr. 12, 2018) (discussing the split of authority as to the impact of Texas appellate waivers on AEDPA finality and that neither the Supreme Court nor the United States Court of Appeals for the Fifth Circuit has considered this question), *rec. accepted*, 2018 WL 2762563 (N.D. Tex. June 8, 2018).

So, even if Court measures finality from when the CCA refused discretionary review, the Section 2254 application is untimely, because, under that approach – most favorable to Vasquez – the applicable state judgment would have become final under AEDPA on June 18, 2013 – 90 days after the CCA refused discretionary review (on March 20, 2013). *See Roberts v. Cockrell*, 319 F.3d 690, 692 (5th Cir. 2003) (observing that, if a petitioner halts the review process, “the conviction becomes final when the time for seeking further direct review in the state court expires” and noting that the Supreme Court allows 90 days for filing a petition for certiorari following the entry of judgment); SUP. CT. R. 13.

And, “[b]ecause [Vasquez’s first] state habeas petition was not filed within the one-year period” that commenced on that date, “it did not statutorily toll the limitation clock.” *Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013) (citing *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (citing, in turn, 28 U.S.C. § 2244(d)(2))).

Accordingly, under Section 2244(d)(1)(A), the Section 2254 application was filed more than 8 years too late. The application is therefore due to be dismissed as untimely under Habeas Rule 4 absent statutory or equitable tolling of the limitations period or establishment of actual innocence.

But Vasquez neither explains how another provision of Section 2244(d)(1) could apply here, nor advances a claim of tolling under the narrow actual innocence gateway, nor makes allegations that could establish either prong of equitable tolling – that he pursued his rights diligently and that an extraordinary circumstance beyond his control prevented his timely filing of the federal petition.

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

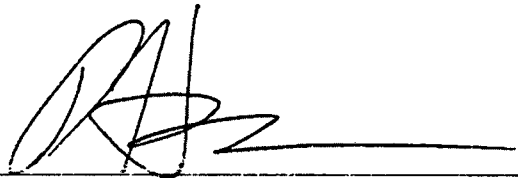
Recommendation and Directions to Clerk

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

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

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

DATED: January 3, 2023

A handwritten signature in black ink, appearing to be 'D. Horan', written over a horizontal line.

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

**United States Court of Appeals
for the Fifth Circuit**

No. 23-10166

United States Court of Appeals
Fifth Circuit

FILED

June 16, 2023

Lyle W. Cayce
Clerk

Petitioner—Appellant,

ARTHUR VASQUEZ,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION;
STATE OF TEXAS,

Respondents—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:22-CV-2911

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

UNPUBLISHED ORDER

Before CLEMENT, SOUTHWICK, and HIGGINSON, *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

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02:18PM 1 verdict into the record. You don't recall how many
02:19PM 2 minutes passed?

02:19PM 3 A. I don't know how many minutes passed but since
02:19PM 4 the Judge was gone, I must have learned that they found
02:19PM 5 Mr. Vasquez guilty.

02:19PM 6 Q. Do you remember how you learned?

02:19PM 7 A. I don't know.

02:19PM 8 Q. Did a bailiff tell you? Did the court
02:19PM 9 reporter? You don't remember who told you that he was
02:19PM 10 found guilty?

02:19PM 11 A. It might have been a bailiff. I don't know.

02:19PM 12 Q. And you mentioned that you did discuss some
02:19PM 13 parole issue with Mr. Vasquez. Do you recall testifying
02:19PM 14 to that?

02:19PM 15 A. Right.

02:19PM 16 Q. Did you talk about when he might be eligible
02:19PM 17 for parole if he took 40 years? Do you recall talking
02:19PM 18 to him about that?

02:19PM 19 A. Well, on a 40-year sentence you had to do half
02:19PM 20 of that minus his good time that he's been in, whatever
02:19PM 21 that would be, 18 years, 19 years. I don't know.
02:19PM 22 Whatever it was.

02:19PM 23 Q. Do you recall talking to him about what his
02:20PM 24 parole eligibility would be if he received life in
02:20PM 25 prison?

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(Off-the-record discussion)

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THE COURT: During this brief break I had an off the record conversation with my bailiff Brian Cook to see if he recalled the circumstances of how the parties came to know what the verdict was prior to my arrival back in the building. He doesn't remember either. But I would speculate that Mr. Cook would have told you all what the verdict was.

MR. McCANTS: I would just add, Your Honor, that I know for a fact that as soon as the verdict was read I had to get on the phone and start calling particular officers.

THE COURT: I just looked at the real time transcription of this which has time stamps, the excerpts that I have been given do not have, and checked when I read the verdict relative to when I then informed the jury that an agreement had been reached and there was no lapse in time.

So I read the verdict and immediately told them that y'all had worked out an arrangement. So you were informed -- the two of you were informed, whether it was by Mr. Cook or by me, prior to me reading the verdict to the jury what the verdict was.

I can only -- I can tell you that much. I can't recall whether it was Mr. Cook or it was me but I

02:28PM 1 think those would be the only two -- would either be Mr.
02:28PM 2 Cook or me that would have known prior to and given you
02:28PM 3 that information.

02:28PM 4 MR. McCANTS: Okay. Thank you, Your Honor.
02:28PM 5 I don't have any further questions, Your Honor.

02:28PM 6 MR. MOWLA: Nothing further at this time
02:28PM 7 for Mr. Cox.

02:28PM 8 THE COURT: You may step down.

02:28PM 9 (The witness left the stand.)

02:28PM 10 THE COURT: Do you have any additional
02:28PM 11 evidence?

02:28PM 12 MR. McCANTS: No, Your Honor.

02:28PM 13 THE COURT: Do you have any rebuttal at
02:28PM 14 this time?

02:28PM 15 MR. MOWLA: Very quick rebuttal, Your
02:28PM 16 Honor.

02:28PM 17 THE COURT: All right.

02:29PM 18 Raise your right hand.

02:29PM 19 (The witness was sworn by the Court.)

20 THE COURT: You may have a seat.

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02:43PM 1 based on his gang status, as well as past victims and
02:43PM 2 parole officers.

02:43PM 3 There is no case law, Your Honor, that says
02:43PM 4 a defendant has 48 hours to make a decision on whether
02:43PM 5 he would like to take a plea bargain offer or he would
02:43PM 6 like to let the jury sentence him.

02:44PM 7 There are a lot of rights for defendants
02:44PM 8 but they don't get to stop right then and there. This
02:44PM 9 was a voluntary plea. It was a deal that the defendant
02:44PM 10 knew what he was taking. He understood the
02:44PM 11 ramifications and he very well could have gotten life in
02:44PM 12 prison based on what was coming before him.

02:44PM 13 I submit to the Court this is another
02:44PM 14 attempt from this defendant through and by his family
02:44PM 15 and with him trying to pull the wool over your eyes and
02:44PM 16 trying to get another shot down the road, another shot
02:44PM 17 in which he at the point in time voluntarily agreed to
02:44PM 18 take the 40 and waive his appeal and that was the deal
02:44PM 19 and he knew it and he understood it and he accepted it
02:44PM 20 and it could have been much worse had he not.

02:44PM 21 We ask that you deny the motion for new
02:44PM 22 trial in regards to that.

02:44PM 23 THE COURT: I believe there's been no
02:45PM 24 evidence to show that Mr. Cox is not worthy of belief
02:45PM 25 given his experience in the criminal law area as well as

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02:45PM 1 his reputation. I have no reason to doubt that he
02:45PM 2 properly admonished his client.

02:45PM 3 In addition, my experience, admonishments
02:45PM 4 in motions for continuance were that Mr. Vasquez does
02:45PM 5 not appear to be an easily manipulated individual and I
02:45PM 6 do not believe that he was tricked or manipulated to
02:45PM 7 accept the plea bargain agreement.

02:45PM 8 I'm denying your motion.

02:45PM 9 MR. MOWLA: I need a signed order by the
02:45PM 10 Court for purposes of the record. May I approach?

02:46PM 11 THE COURT: Sure.

02:46PM 12 MR. McCANTS: Thank you, Your Honor.

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(End of Proceedings)

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