United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 25, 2025
Lyle W. Cayce
Clerk

No. 24-20560

WILBERTO ARELLANO,

Petitioner—Appellant,

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Southern District of Texas
USDC No. 4:24-CV-2116

ORDER:

Wilberto Arellano, Texas prisoner # 02025102, moves for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 application challenging his conviction for murder. The district court dismissed Arellano's application as barred by the one-year limitations period of 28 U.S.C. § 2244(d). Arellano argues that his claim of actual innocence serves as a gateway for his otherwise untimely claims. He abandons, for failure to brief, his arguments that he is entitled to statutory and equitable tolling. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

APPENDIX "A"

To obtain a COA, Arellano must make "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, 336 (2003). Because the district court rejected the habeas application on a procedural ground, Arellano must show "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). Arellano has not made the requisite showing. *See id.*

His motion for a COA and motion to proceed in forma pauperis on appeal are DENIED.

KURT D. ENGELHARDT
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILBERTO ARELLANO, a/k/a WILBERTO ARRELLANO, (TDCJ #02025102),	§	
Petitioner,	§	
vs.	§	CIVIL ACTION NO. H-24-2116
BOBBY LUMPKIN, Executive Director of TDCJ-CID	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

The petitioner, Wilberto Arellano, a/k/a Wilberto Arrellano (TDCJ #02025102), is currently incarcerated in the Texas Department of Criminal Justice – Correctional Institutions Division. He filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his 2015 conviction for murder. (Dkt. 1). The respondent answered, seeking dismissal, and provided copies of the state-court records. (Dkts. 11, 12). Arellano filed a timely reply. (Dkt. 13). After considering Arellano's petition, the answer and reply, the record, and the law, the Court dismisses the petition as untimely filed.

I. BACKGROUND

On September 17, 2015, the 339th District Court sentenced Arellano to life in prison after a jury convicted him of murder in Harris County Cause Number

1353257. (Dkt. 11-7, pp. 134-35). The Texas First Court of Appeals affirmed Arellano's conviction and sentence on June 7, 2018. *See Arrellano v. State*, 555 S.W.3d 647 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd). The Texas Court of Criminal Appeals refused Arellano's petition for discretionary review on November 14, 2018. *See Arellano v. State*, PD-0678-18 (Tex. Crim. App. Nov. 14, 2018), available at https://search.txcourts.gov (last visited Nov. 20, 2024). Arellano did not seek further review of his conviction and sentence in the United States Supreme Court. (Dkt. 1, p. 3).

On February 8, 2022, Arellano filed an application for a state writ of habeas corpus through counsel, raising three claims of ineffective assistance of trial counsel. (Dkt. 11-30, pp. 6-25). On February 15, 2023, the Court of Criminal Appeals denied Alonso's application with a written order. *See Ex parte Arellano*, Writ No. 93,869-01, 2023 WL 2000069 (Tex. Crim. App. Feb. 15, 2023).

On June 5, 2024, Arellano filed his petition for a federal writ of habeas corpus in this Court, raising the same three claims he raised in his state habeas application. (Dkt. 1). In responding to the question about the timeliness of his petition, Arellano alleged that he is entitled to equitable tolling because he has diligently pursued his rights, he was unaware of the factual predicate of his claims until counsel filed his state habeas application, he has new evidence of actual innocence, and he does not speak or read English and lacked access to legal materials in Spanish. (*Id.* at 9). As

relief, Arellano asked the Court to remand for a new trial on punishment or an out-of-time hearing on a motion for new trial. (*Id.* at 7).

The respondent filed an answer, seeking dismissal of the petition based on the expiration of the statute of limitations and asserting that Arellano does not satisfy either the actual innocence or equitable exceptions to the limitations period. (Dkt. 12). Arellano filed a reply, contending that the prison's lack of legal materials in Spanish prevented him from timely filing his petition. (Dkt. 13, pp. 3-4). He also contends that he should be entitled to relief under the actual innocence exception because "he was not at the place where the crime took place and could not have been the culprit." (*Id.* at 4).

II. DISCUSSION

A. Statute of Limitations

Arellano's petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"), which contains a one-year limitations period. *See* 28 U.S.C. § 2244(d). That one-year period runs from the latest of four accrual dates:

> (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 limitations period is an affirmative defense, *Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999), which the respondent raised in his answer to Arellano's petition.

Arellano's time to file a federal habeas petition challenging his conviction and sentence began to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The pleadings and matters of record show that Arellano's conviction became final for purposes of federal habeas review on February 12, 2019, when the 90-day time to seek review of his conviction in the United States Supreme Court expired. *See Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003) ("[A] state prisoner's conviction becomes final for purposes of § 2244 ninety days after the judgment is entered, when the time to file a petition for writ of certiorari with the Supreme Court has expired."); *see also* SUP. CT. R. 13(1) (a petition for a writ of certiorari is due within 90 days of the entry of an order denying discretionary review by the state court of last resort). The deadline for

Arellano to file a timely federal habeas petition was one year later, on February 12, 2020. Arellano's federal petition, filed June 5, 2024, is well outside the limitations period and is time-barred unless Arellano can show that an exception to the limitations period applies.

Under 28 U.S.C. § 2244(d)(2), the time during which a properly filed application for state habeas relief or other collateral review is pending extends the limitations period. *See Artuz v. Bennett,* 531 U.S. 4, 5 (2000). But a state habeas application filed after the federal limitations period has expired does not extend an already expired limitations period. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Arellano filed his state habeas application on February 8, 2022, almost two years after the federal limitations period had expired. This belated state habeas application did not restart the already expired federal limitations period. Arellano's federal habeas petition is time-barred unless another statutory exception applies.

But Arellano has not alleged facts showing that any other statutory extension applies. He has not alleged facts showing that any unconstitutional state action prevented him from filing his federal habeas petition before the expiration of the limitations period. *See* 28 U.S.C. § 2244(d)(1)(B). He has not alleged facts showing that his claims are based on a newly recognized constitutional right. *See* 28 U.S.C. § 2244(d)(1)(C). And he has not alleged facts showing that the factual basis for his claims could not have been timely discovered if he had acted with due diligence.

See 28 U.S.C. § 2244(d)(1)(D). As a result, there is no statutory basis to allow Arellano to avoid the effect of the limitations period, and his petition is time-barred unless another exception applies.

B. Equitable Tolling

In some instances, equitable tolling can extend the limitations period. Equitable tolling is an extraordinary remedy that applies only in the rare situation "when strict application of the statute of limitations would be inequitable." *Mathis v. Thaler*, 616 F.3d 461, 475 (5th Cir. 2010) (quoting *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (per curiam)); *see also Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998) (equitable tolling applies only "in rare and exceptional circumstances"). A habeas "petitioner is entitled to equitable tolling only if he 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 v. Florida*, 560 U.S. 631, 649 (2010) (cleaned up) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). The failure to meet the statute of limitations "must result from external factors beyond [the petitioner's] control; delays of the petitioner's own making do not qualify." *In re Wilson*, 442 F.3d at 875. Therefore, a "garden variety claim of excusable neglect" does not support equitable tolling. *Lookingbill v. Cockrell*, 293 F.3d 256, 264 (5th Cir. 2002). Neither does a lack of knowledge of the law, a misunderstanding of filing deadlines, or status as a layman. *See Felder v. Johnson*,

204 F.3d 168, 171-72 (5th Cir. 2000) (citing cases). And the habeas petitioner has the burden of justifying equitable tolling. *See Holland*, 560 U.S. at 649; *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (per curiam).

Arellano does not satisfy either of the requirements for equitable tolling. First, he has not alleged facts showing that he has diligently pursued his rights. In his pleadings, Arellano alleges that he should be entitled to equitable tolling because he did not learn of the factual predicate for his claims until his family raised the funds to retain counsel to file a state habeas application on his behalf. (Dkts. 1, p. 9; 13, pp. 1-2). While this might explain some portion of the three-year delay between Arellano's conviction becoming final and his filing his state habeas petition, it does not explain the 16-month delay between the denial of his state application and the filing of his federal petition. Equitable tolling is not intended to benefit those who sleep on their rights, *see Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012), and this long period of inactivity indicates a lack of due diligence.

Second, Arellano has not alleged any facts tending to show that his failure to file a timely petition was due to external factors beyond his control. He cites his lack of knowledge of the law, his status as a layman, and his lack of knowledge of English, but none of these constitute the exceptional circumstances necessary to support equitable tolling. *See Felder*, 204 F.3d at 171-72 (status as a layman is not sufficient to support equitable tolling); *Briones v. Director, TDCJ-CID*, No. 3:21-

cv-0957-B-BN, 2024 WL 1254802, at *2 (N.D. Tex. Mar. 22, 2024) (an inmate's inability to speak, write, and understand English is not an extraordinary circumstance that warrants equitable tolling) (citing *Cantu v. Stephens*, No. 7:14-cv-757, 2016 WL 1253839, at *7 (S.D. Tex. Feb. 25, 2016), *report and recommendation adopted*, 2016 WL 1247229 (Mar. 30, 2016)); *see also Diaz v. Kelly*, 515 F.3d 149, 154 (2d Cir. 2008) (absent a showing of due diligence, a petitioner's bare allegation that he lacked access to a translator during the limitations period is insufficient to justify equitable tolling for a language deficiency); *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) ("An inability to speak, write and/or understand English, in and of itself, does not automatically" justify equitable tolling.); *Mendoza v. Minnesota*, 100 F. App'x 587, 588 (8th Cir. 2004) (per curiam) (lack of fluency in English does not constitute an extraordinary circumstance that warrants equitable tolling); *Mendoza v. Carey*, 449 F.3d 1065, 1069 (9th Cir. 2006) ("[A] non-English-speaking petitioner seeking equitable tolling must, at a minimum, demonstrate that during the running of the AEDPA time limitation, he was unable, despite diligent efforts, to procure either legal materials in his own language or translation assistance from an inmate, library personnel, or other source."); *Yang v. Archuleta*, 525 F.3d 925, 929 (10th Cir. 2008) (lack of English language proficiency is not an extraordinary circumstance that warrants equitable tolling). The inability to speak or read the English language is not uncommon in the Texas prison system,

and, standing alone, that circumstance does not entitle Arellano to equitable tolling of the limitations period.

Because Arellano has failed to satisfy either element necessary to entitle him to equitable tolling, the limitations period will not be extended on this basis. His petition is time-barred unless another exception applies.

C. Actual Innocence

In the alternative, Arellano argues that he is entitled to habeas relief because he is actually innocent. The Fifth Circuit does not recognize a freestanding claim of actual innocence on federal habeas review. *See Floyd v. Vannoy*, 894 F.3d 143, 155 (5th Cir. 2018) (per curiam); *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009) (per curiam). Instead, a claim of actual innocence, if proven, serves only to excuse a failure to comply with the federal limitations period and to provide a "gateway" to review otherwise time-barred claims. *McQuiggen v. Perkins*, 569 U.S. 383, 386 (2013).

To fall within the actual innocence exception to the limitations period, the habeas petitioner must present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The new evidence must be "material, not merely cumulative or impeaching," *Lucas v. Johnson*, 132 F.3d 1069, 1075, n.3 (5th Cir. 1998), and it must bear on the

petitioner's factual innocence rather than the legal insufficiency of the State's evidence. *See Bousley v. United States*, 523 U.S. 614, 623-24 (1998). Further, to be entitled to proceed under the exception, the petitioner must demonstrate that when the new evidence is considered along with the evidence presented at trial, it is more likely than not that no reasonable juror would have convicted him. *Id.* at 623 (quoting *Schlup*, 513 U.S. at 328).

Arellano does not meet this demanding standard. Initially, the Court notes that nowhere in Arellano's pleadings does he identify any new evidence that would support his claim of actual innocence. On this basis alone, he has failed to meet his burden to show that he is entitled to proceed under the actual innocence exception. *See United States v. Torres*, 163 F.3d 909, 912 (5th Cir. 1999) (noting that the petitioner has the burden to prove that he is entitled to proceed under the actual innocence exception).

However, the Court's independent review of the pleadings shows that Arellano's appointed trial counsel filed a motion for new trial based on newly discovered evidence in the form of an affidavit from Arellano's sister-in-law, Maria Victoria Maldonado Mondragon. (Dkt. 11-7, pp. 151-58). Assuming that Mondragon's affidavit is the "new" evidence relied upon by Arellano, it is nevertheless insufficient to satisfy the demanding *Schlup* standard for actual innocence.

In her affidavit, Mondragon states that she was present at the restaurant when the shooting occurred, that Arellano was not present that evening, and that it was her husband—Arellano's brother—who shot the victim. (*Id.* at 157). Mondragon states that she did not come forward earlier because she was concerned that she and her children would be harmed if she did. (*Id.*). She also states that she did not believe that Arellano would be convicted since he was not there, and so she believed that "it would all work out" even if she did not testify. (*Id.*). In his motion for new trial based on this affidavit, Arellano argued that Mondragon's testimony constituted new, previously undiscovered evidence that supported his misidentification defense. (*Id.* at 153-55).

To the extent that this testimony was unavailable to Arellano before trial due to Mondragon's decision not to come forward, it may satisfy the *Schlup* requirement for "new" evidence. However, the affidavit testimony does not satisfy the second requirement of the actual innocence exception because Arellano cannot show that no reasonable jury would have convicted him had this new evidence been presented along with the other evidence at trial.

Multiple eyewitnesses testified at Arellano's trial and identified him as the shooter. (Dkts. 11-23, 11-24). Mondragon's affidavit asserts that these witnesses were wrong, and she identifies Arellano's brother as the shooter. (Dkt. 11-7, p. 157). Rather than proving Arellano's innocence and requiring an acquittal, Mondragon's

testimony would simply create a factual dispute as to whether Arellano was present at the restaurant on the night of the shooting and whether he was, in fact, the shooter. These factual disputes would be for the jury to consider and weigh. And while Arellano's counsel argued in his motion for new trial that Mondragon's testimony would be more credible than that of the other eyewitnesses, her testimony would be subject to impeachment due to her family relationship to Arellano and her lengthy delay in coming forward to exonerate him. Considering the factual disputes and credibility issues that would be raised by the "new" evidence, the Court cannot say that it is more likely than not that no jury would have convicted Arellano had Mondragon testified.

In sum, Arrellano has failed to carry his burden to show that he is entitled to an extension of the limitations period under the *Schlup* standard for actual innocence. Because his petition is otherwise untimely, it must be dismissed as barred by the statute of limitations.

III. CERTIFICATE OF APPEALABILITY

Habeas corpus actions under § 2254 require a certificate of appealability to proceed on appeal. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner. To be entitled to a certificate of appealability, the

petitioner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Tennard v. Dretke*, 542 U.S. 274, 276 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (quoting *Slack*, 529 U.S. at 484). When the denial of relief is based on procedural grounds, the petitioner must show not only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," but also that they "would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. A district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (per curiam).

Because Arellano has not shown that reasonable jurists would find the Court's resolution of the constitutional issues debatable or wrong, this Court will not issue a certificate of appealability.

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court **ORDERS** as follows:

1. Arellano's petition for writ of habeas corpus, (Dkt. 1), is **DISMISSED** with prejudice as barred by the statute of limitations.
2. Final judgment will be separately entered.
3. All pending motions are **DENIED** as moot.
4. A certificate of appealability is **DENIED.**

The Clerk shall send a copy of this Order to the parties.

SIGNED at Houston, Texas on Nov 26, 2024.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE