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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-51071
USDC No. 6:12-CV-284



A True Copy
Certified order issued Aug 03, 2017

RICARDO ENRIQUEZ SANCHEZ,

John W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Plaintiff-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Defendant-Appellee

Appeal from the United States District Court for the
Western District of Texas, Waco

Before PRADO, ELROD, and GRAVES, Circuit Judges.

PER CURIAM:

Ricardo Enriquez Sanchez, Texas prisoner # 1745089, was convicted by a jury of two counts of indecency with a child and was sentenced to consecutive terms of 13 years in prison. The district court rejected Enriquez Sanchez's initial 28 U.S.C. § 2254 application as untimely, and in 2015 a judge of this court denied him a certificate of appealability (COA). Enriquez Sanchez then filed numerous motions in the district court, seeking to challenge the validity of his convictions. The district court denied these motions, noting that it lacked authority to review his claims because Enriquez Sanchez had not obtained authorization to file a successive § 2254 application. In addition, the district

court warned Enriquez Sanchez that the filing of further frivolous pleadings could result in sanctions. Following this, Enriquez Sanchez moved for a new trial, again challenging the validity of his indecency convictions. The district court denied the motion and ordered the Clerk of Court to accept no further motions in the habeas proceedings without leave from the court. Enriquez Sanchez now appeals this ruling. In the order denying in forma pauperis (IFP) status, the district court noted that it lacked jurisdiction over Enriquez Sanchez's unauthorized successive § 2254 claims.

Because Enriquez Sanchez must obtain a COA to appeal the district court's order, *see Cardenas v. Thaler*, 651 F.3d 442, 443 (5th Cir. 2011); *Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007), we construe his numerous motions and briefs filed in this court as a motion for a COA. The majority of Enriquez Sanchez's pleadings challenge the validity of his underlying convictions and assert his innocence. He does, however, contend that he did not intend to file a successive § 2254 application and that the district court misconstrued his pleadings as such. Enriquez Sanchez also maintains that rather than construing his instant motion as a successive § 2254 application, the court should consider his claims as a request for review by the Court of Appeals for the Armed Forces under 10 U.S.C. § 867; a motion for extraordinary relief under 28 U.S.C. § 1651(a); a habeas petition submitted under 28 U.S.C. § 2241; or a petition filed under the Administrative Procedures Act, 5 U.S.C. §§ 701-706. He does not challenge the district court's imposition of the filing sanction, and any such assertion is deemed abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

In order to obtain a COA, the applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also*

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). An applicant “satisfies this standard by demonstrating 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*, 537 U.S. at 327. When the district court denies relief on procedural grounds, “a COA should issue 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 v. McDaniel*, 529 U.S. 473, 484 (2000).

Enriquez Sanchez has not made the requisite showing. Consequently, his motion for a COA is DENIED. His motions for leave to proceed IFP and appointment of counsel are likewise DENIED. Enriquez Sanchez’s motions to amend and supplement his brief are GRANTED. His motion for settlement of the criminal case on the basis of a void judgment is DENIED. Likewise, his motion requesting that this court vacate and set aside the prior denial of a COA is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50166



RICARDO ENRIQUEZ SANCHEZ,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

A True Copy
Certified order issued Jun 21, 2017

Lyfe W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Appeal from the United States District Court for the
Western District of Texas, Waco
USDC No. 6:13-CR-24-1 / 6:12-CV-284

Before REAVLEY, DENNIS, and HIGGINSON, Circuit Judges.

PER CURIAM:

This court must examine the basis of its jurisdiction, on its own motion if necessary. *Hill v. City of Seven Points*, 230 F.3d 167, 169 (5th Cir. 2000). In this case, the petitioner filed a document titled "Notice of Appeal." The document did not identify any judgment or order of the court that he wanted to appeal.

The notice of appeal does not comply with the provisions of Rule 3 of the Federal Rules of Appellate Procedure, which require that the notice identify the judgment, order, or part thereof, that is being appealed. *See* FED. R. APP.

17-50166

P. 3(c). The requirement is liberally construed, but “[R]ule 3’s dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review.” *Smith v. Barry*, 502 U.S. 244, 248 (1992); *Bailey v. Cain*, 609 F.3d 763, 765 (5th Cir. 2010). Here, the notice of appeal does not identify a judgment or order that the petitioner wants this court to review. Consequently, we do not have jurisdiction over the appeal and it must be dismissed.

IT IS SO ORDERED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 21, 2017

Ms. Jeannette Clack
Western District of Texas, Waco
United States District Court
800 Franklin Avenue
Waco, TX 76701

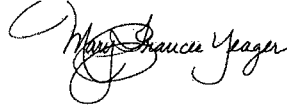
No. 17-50166 Ricardo Sanchez v. Lorie Davis, Director
USDC No. 6:12-CV-284

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Mary Frances Yeager, Deputy Clerk
504-310-7686

cc w/encl:

Mr. Edward Larry Marshall
Mr. Ricardo Enriquez Sanchez

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

WACO DIVISION

**RICARDO ENRIQUEZ SANCHEZ,
TDCJ # 1745089,
Petitioner,**

v.

**WILLIAM STEPHENS,
Director, Texas Department
of Criminal Justice,
Correctional Institutions Division,
Respondent.**

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Civil No. W-12-CA-284

ORDER

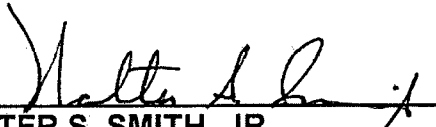
Before the Court is Petitioner's pleading that has been docketed as a Motion for Leave to Appeal. (Doc. 144). The Court construes the instant motion as one seeking a certificate of appealability ("COA").

On December 2, 2014, the Court adopted the findings and conclusions set forth in the Magistrate Judge's Report and Recommendation ("R&R"), denied Petitioner's application for writ of habeas corpus under 28 U.S.C. § 2254, and dismissed this action. (Doc. 137). The Court further stated in the December 2 Order that a COA should not issue. (*Id.* at 14). Petitioner subsequently filed a Notice of Appeal. (Doc. 142).

Petitioner's current motion, construed as one seeking a COA, is deemed moot. To the extent Petitioner seeks reconsideration of the Court's denial of a COA, such request is without merit. Accordingly, it is

ORDERED that Petitioner's motion for a COA (Doc. 144) is hereby **DENIED**.

SIGNED this 19th day of February, 2015.



WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

CIVIL ACTION NO. W-12-CV-284

PROCEDURAL HISTORY

On July 20, 2009, a jury convicted Petitioner of two counts of indecency with a child and sentenced him to thirteen years of confinement for each count. Petitioner appealed his conviction, which the Tenth Court of Appelas affirmed on August 11, 2010. *Sanchez v. State*, No. 10-09-00243-CR (Tex. App.—Waco, pet. refd). The Texas Court of Criminal Appeals denied Petitioner's subsequent request for discretionary review on February 2, 2011.

Petitioner improperly filed a state habeas corpus action challenging his convictions. See State Habeas Corpus Record ("SHCR") -01 through SHCR-05. Petitioner's § 11.07 state habeas corpus action challenged convictions unrelated to the convictions at issue in the present federal action. See SHCR-04; see also TEX. CODE CRIM. P. § 11.07 (establishing the procedures for a state writ of habeas corpus application seeking relief from felony convictions imposing a penalty other than death). Petitioner's other actions before the Texas Court of Criminal Appeals have been requests for mandamus relief or original petitions for habeas corpus, all of which the court denied leave to file or denied outright. See SHCR-01,-02,-03,-05.

On November 14, 2012, Petitioner filed the instant habeas corpus action, challenging the two before-mentioned convictions of indecency with a child. Petitioner raises six claims:

- 1) The prosecution erred by presenting perjured testimony, failing to disclose exculpatory evidence, improperly admitting prior convictions, and making improper jury arguments;
- 2) The trial court erred by submitting an erroneous jury charge, and by failing to allow all of Petitioner's desired testimony;
- 3) Actual innocence;
- 4) Petitioner was subjected to an illegal arrest, search, and seizure;
- 5) Ineffective assistance of counsel; and
- 6) Violation of the Double Jeopardy Clause.

Respondent filed an Answer with Brief in Support, and Petitioner has filed several supporting briefs and responses. The Magistrate Judge reviewed the application and recommended it be denied.¹ Petitioner timely objected, entitling him to *de novo* review. See *Longmire v. Guste*, 921 F.2d 620, 623 (5th Cir. 1991).

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which governs the case at hand, "substantially restricts the scope of federal review of state criminal court proceedings." *Montoya v. Johnson*, 226 F.3d 399, 404 (5th Cir. 2000). In short, the AEDPA seeks to prevent "federal habeas 'retrials' . . . to ensure that state-court convictions are given effect to the extent possible under

¹ Petitioner has filed numerous briefing materials with the Court subsequent to the Magistrate Judge's Report and Recommendation, which further his contentions found in the habeas petition. The Court is persuaded that these documents would not have any effect on the Report and Recommendation. Regardless, the Court's *de novo* review has taken each of these documents into consideration in preparing this Order.

the law.” *Bell v. Cone*, 535 U.S. 685, 693 (2002). Accordingly, a habeas petitioner under the AEDPA has the burden to prove his entitlement to its relief. *Montoya*, 226 F.3d at 405.

The applicability of § 2254(d)(1)–(2) is limited to claims that were adjudicated “on the merits in state-court proceedings.” 28 U.S.C. § 2254(d). The term of art “on the merits” refers to whether a state-court’s disposition of a habeas petition was substantive as opposed to procedural. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997). As the Texas Court of Criminal Appeals has noted, under Texas law, denial of a state habeas petition, rather than dismissal, indicates the state-court’s resolution of the petitioner’s claims was a substantive adjudication “on the merits.” *Salazar v. Dretke*, 419 F.3d 384, 398-99 (5th Cir. 2005); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000).

A decision is contrary to clearly established federal law “if the state-court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 413 (2000). Alternatively, a habeas petitioner may demonstrate that a state-court decision was an unreasonable application of federal law under § 2254(d)(1) if “the state-court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* However, to be unreasonable, a state-court’s decision must be more than merely

incorrect. See *Gardner v. Johnson*, 247 F.3d 551, 559-60 (5th Cir. 2001). A reversal is not required unless the "state-court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'" *Id.*; see *Montoya v. Johnson*, 226 F.3d 399, 404 (5th Cir. 2000).

Additionally, in reviewing a state prisoner's federal habeas petition, a "determination of a factual issue made by a state court shall be presumed to be correct," and a petitioner "shall have the burden of rebutting the presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Consequently, in the state courts, a petitioner must be diligent in developing the record and presenting all claims of constitutional error. If the prisoner fails to do so, § 2254(e) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. *Williams*, 529 U.S. at 437.

DISCUSSION

Parties may file objections to a Magistrate Judge's Report and Recommendation. However, a party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive, or general objections. See *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in the Report within fourteen days after the party is served with a copy of the report shall bar that party from a *de novo* District Court review and, except

upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions the District Court accepts. 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985).

In requesting a *de novo* review, Petitioner has made six objections to the Magistrate Judge's Report and Recommendation. Petitioner claims that: (1) the prosecution erred by presenting perjured testimony, failing to disclose exculpatory evidence, improperly admitting prior convictions, and making improper jury arguments; (2) the trial court erred by submitting an erroneous jury charge, by failing to allow all of Petitioner's desired testimony; (3) he is actually innocent; (4) he was subject to an illegal arrest, search, and seizure; (5) he received ineffective assistance of counsel; and (6) the Double Jeopardy Clause was violated. Irrespective of these claims, Petitioner is time barred pursuant to Title 28 U.S.C § 2244(d)(1).

1. AEDPA Limitation.

Any § 2254 petition filed after April 24, 1996, is subject to the mandates of the AEDPA. See *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). The AEDPA amendments made to 28 U.S.C § 2244 read as follows:

(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.

28 U.S.C. § 2244(d)(1)-(2). The AEDPA provides a one-year limitation period for state prisoners to proceed to federal court with their habeas corpus actions. *Id.* at § 2244(d)(1). The limitation period typically begins running on the date the judgment becomes final by the conclusion of direct review or the expiration of time for seeking such review. *Id.* at § 2244(d)(1)(A). A jury convicted Petitioner on July 20, 2009, and the Texas Court of Criminal Appeals denied his petition for discretionary review on February 2, 2011. Petitioner did not seek certiorari from the U.S. Supreme Court, and the deadline for seeking this form of relief expired ninety-days later on May 3, 2011. As this date was the conclusion of direct review or the expiration of time of seeking such review, this date triggered the start of the one-year limitation period. *Id.* at § 2244(d)(1)(A). Because there was

no tolling, the limitation period expired one-year later on May 3, 2012. Petitioner filed this action on October 9, 2012, over five months too late. Doc. 7 at 10.

Petitioner objects to the limitation and argues there was an unreasonable delay in bringing about the prosecution. Petitioner's objection, however, is vague and does not offer any authority on point to support his claim. Petitioner contends courts sometimes reverse due to an unreasonable delay in prosecution that results in prejudice to the defendant. But Petitioner offers neither applicable authority nor an explanation of how this claim applies to his case.

Under 28 U.S.C. § 2244(d)(2), the time during which a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim that is pending shall not be counted toward the period of limitation. In this case, Petitioner did not properly file a § 11.07 state habeas corpus action challenging the two convictions in this action. See SHCR WR-75,568-01 through -05.

While Petitioner has failed to properly raise the instant claims before the state courts, a thorough and liberally construed review of his various actions before the Court of Criminal Appeals shows that three of his five actions could conceivably be collateral attacks upon the convictions at issue in this federal action. See SHCR WR-75,568-01, -03, and -05. Even assuming, arguendo, that these three actions were properly filed collateral attacks, those actions pended for a sum of only eighty-two days. See SHCR 75,568-01, -03, and -05; 28 U.S.C.

§ 2244(d)(2). Tolling Petitioner's limitation period for eighty-two days would extend his filing deadline to July 24, 2012. However, Petitioner filed his action on October 9, 2012, over two months after the expiration of the most generous possible interpretation of the limitation period. Doc. 7 at 10.

Petitioner does not allege, nor do his pleadings suggest, the existence of any impediment to the filing of a state habeas action on this claim. See 28 U.S.C. § 2244(d)(1)(B). Likewise, Petitioner does not identify any new constitutional rule made retroactively applicable to habeas cases. *Id.* at § 2244(d)(1)(C). Petitioner's claims are of the kind that, through the exercise of due diligence, would have been discovered before the conviction became final. *Id.* at § 2244(d)(1)(D).

Petitioner's conviction became final on May 3, 2011. Because no tolling is available to Petitioner, the limitation period expired one-year later on May 3, 2012. Petitioner filed this habeas action on October 9, 2012, which is over five-months past the AEDPA deadline. Because Petitioner failed to timely pursue his claims, the Court is barred from hearing them on the merits.

2. Petitioner's Actual Innocence Claim.

Petitioner contends he is actually innocent. In support, Petitioner claims he has exonerating evidence his attorney failed to present at trial, such as affidavits, witness statements, account history, photographs, an eviction notice, and other evidence. Doc. 7 at 7. In response, Respondent argues Petitioner misapplies the concept of actual innocence, and therefore his claim is still barred.

In the context of federal habeas corpus, the term actual innocence applies to specific circumstances under which the AEDPA's statute of limitations may be tolled. Actual innocence is not a constitutional claim for habeas relief, per se; instead, it is a gateway to habeas review of a procedurally defaulted claim. *House v. Bell*, 547 U.S. 518, 537 (2006). A convincing showing of actual innocence enables a habeas petitioner to overcome a procedural bar to consider the merits of their constitutional claims. *Id.*; *Schlup v. Delo*, 513 U.S. 298, 324 (1995). In order to establish actual innocence to allow habeas review of a defaulted claim, Petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of new evidence." *Schlup*, 513 U.S. at 327.

Here, Petitioner misapplies the term actual innocence to raise an independent claim that his possession of exculpatory evidence proves he is actually innocent. Doc. 7 at 7. Actual innocence, however, is not a stand-alone claim. To the contrary, it is merely a gateway to bring other, otherwise barred claims.

Although Petitioner argues witnesses against him perjured themselves, he does not offer any new, conclusive evidence in support of these assertions. See, e.g., Docs. 19, 20, 21, 22, 23, 31, 32, 39, 40, 48, 50, 55, 68, 69, 73, 76, 82, 96, 112, and 123. In his objection, Petitioner argues he is actually innocent because the state did not prove his guilt. Petitioner further claims certain witnesses'

statements demand review. However, each of these claims are meritless because they are also without any evidence in support.

Even if Petitioner had not misapplied the term actual innocence, it is of no consequence. Petitioner failed to offer any evidence that would show it is more than likely than not that no reasonable juror would have convicted him had this new evidence been presented at trial. *Schlup*, 513 U.S. at 327. Because Petitioner's actual innocence assertion is without merit, this action remains barred pursuant to 28 U.S.C § 2244(d).

3. Petitioner's Claim Regarding his Prison Disciplinary Case.

On June 19, 2012, in disciplinary case number 2012277287, prison disciplinary officials found Petitioner guilty of committing an unsafe act that resulted in an injury. Doc. 7 at 5. Prison officials assessed punishment of thirty days of recreation and commissary restriction, a reprimand, and a temporary suspension of visitation privileges. Prison Disciplinary Record ("DHR") at 2. Officials did not assign additional punishment or revoke any of Petitioner's previously accrued good time. *Id.*; Doc. 7 at 5. The Supreme Court has held:

[W]e recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary

incidents of prison life.

Sandin v. Conner, 515 U.S. 472, 483-84 (1995) (citations omitted). “These interests are generally limited to state created regulations or statutes which affect the quantity of time rather than the quality of time served by a prisoner.” *Madison v. Parker*, 104 F.3d 765, 767 (5th Cir. 1997). Thus, punishments such as commissary restriction, cell restriction, property restriction, time-earning-class reductions, or solitary confinement of up to fifteen days do no rise to the level of a constitutional violation. See *Malchi v. Thaler*, 211 F.3d 953, 959 (5th Cir. 2000) (holding that thirty day cell restriction and loss of commissary privileges does not implicate due process); see also *Madison*, 104 F.3d at 768 (same). Additionally, the Fifth Circuit has held that inmates have neither a protectable property nor liberty interest in custodial classification. *Mikeska v. Collins*, 900 F.2d 833, 836 (5th Cir. 1990) (citing *Moody v. Baker*, 857 F.2d 256, 258-59 (5th Cir. 1988)).

Here, none of the punishments imposed on Petitioner amount to an atypical and significant hardship, nor do they trigger any due process protection. Moreover, Petitioner concedes prison officials did not revoke any of his previously-accrued good time. Doc. 7 at 5. Accordingly, Petitioner’s habeas challenge to the disciplinary case is dismissed because he has no protectable due process interest at stake.

4. Petitioner’s Motion for Summary Judgment.

Petitioner has filed what is ostensibly a motion for summary judgment.

Doc. 116. The intent of the Motion is unclear, but taken in context of the attachments, Petitioner appears to object to his sex offender counseling. *See id.*

In Petitioner's objections, he seems to argue that, pursuant Tex. R. Civ. P. 329b(g), his Motion for Summary Judgment tolls the statute of limitations under 28 U.S.C. § 2244. However, Tex. R. Civ. P. 329b(g) is inapplicable to this case. Further, Petitioner's Motion does not discuss the issues raised in his habeas corpus petition. For each of these reasons, the Motion and objection in response to the Report and Recommendation do not entitle Petitioner to relief.

CONCLUSION

The Magistrate Judge, in a careful and thorough review of the case and applicable law, has recommended that Petitioner's habeas application be denied. Having carefully reviewed the report and Petitioner's objections *de novo*, the Court is persuaded the Magistrate Judge's findings and recommendation should be adopted. Accordingly, it is

ORDERED that the Magistrate Judge's findings and recommendation are **ADOPTED**. It is further

ORDERED that Petitioner's application for federal writ of habeas corpus is **DENIED** and this case is **DISMISSED**. It is further

ORDERED that any motions this Court or the Magistrate Judge have not previously ruled upon are **DENIED**. *See, e.g.,* Docs. 116, 134, and 135.

Additionally, having considered the findings and conclusions set forth

above and the requirements of 28 U.S.C. § 2253, the Courts finds, *sua sponte*, that a certificate of appealability should not issue, as Petitioner has failed to make a substantial showing of the denial of a constitutional right.

SIGNED on this 22 day of December, 2014.


WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

FILED

OCT 20 2014

CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY MC DEPUTY

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION**

**RICARDO ENRIQUEZ SANCHEZ,
TDCJ # 1745089,
Petitioner,**

VS.

**BRAD LIVINGSTON,
Texas Department of
Criminal Justice,
Correctional Institutions Division,
Respondent.**

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CIVIL ACTION NO. W-12-CA284

**REPORT AND RECOMMENDATION OF
THE UNITED STATES MAGISTRATE JUDGE**

**TO: THE HONORABLE WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE**

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

I. BACKGROUND AND STATEMENT OF THE CASE

Petitioner Ricardo Sanchez filed the instant action pursuant to Title 28 U.S.C. § 2254. Petitioner is before the Court pro se and in forma pauperis. He is in custody of the Texas Department of Criminal Justice–Correctional Institutions Division (“TDCJ-CID”) pursuant to a conviction from the 54th District Court of McLennan County, Texas in cause number 2008-

2008-1925-C1. On July 20, 2009, a jury convicted Petitioner of two counts of indecency with a child and sentenced him to thirteen years of confinement for each count respectively. Pet. at 2. Petitioner appealed his conviction. On August 11, 2010, the Tenth Court of Appeals confirmed the conviction. *Sanchez v. State*, slip op. at 1-3. The Texas Court of Criminal Appeals denied Petitioner's subsequent request for discretionary review on February 2, 2011.

While Petitioner has repeatedly litigated other legal matters, he has not properly filed a state habeas corpus action challenging the instant convictions. *See* State Habeas Corpus Record ("SHCR") -01 through SHCR-05. Petitioner's sole 11.07 state habeas corpus action challenged convictions unrelated to the convictions at issue in the present federal action. *See* SHCR-04. All of Petitioner's other actions before the Texas Court of Criminal Appeals have been requests for mandamus relief or original petitions for habeas corpus, all of which the court denied leave to file or denied outright. *See* SHCR-01, -02, -03, -05.

In the instant federal habeas action, Petitioner challenges the two above-referenced indecency with a child convictions. In the course of his voluminous pleadings, he apparently also seeks to challenge the outcome of a prison disciplinary hearing that is unrelated to his holding convictions. *See* ECF No. 18 at 1-2. As to his indecency with a minor convictions, Petitioner raises five claims:

- 1) The prosecution erred by presenting perjured testimony, failing to disclose exculpatory evidence, improperly admitting prior convictions, and making improper jury arguments;
- 2) The trial court erred by submitting an erroneous jury charge, and by failing to allow all of Petitioner's desired testimony;
- 3) Actual innocence;

- 4) Petitioner was subjected to an illegal arrest, search and seizure;
- 5) Ineffective assistance of counsel; and
- 6) Violation of the Double Jeopardy Clause.

ECF No. 7 at 6-7; ECF No. 17 at 2 and 12; ECF No. 19 at 2-4, 11; ECF No. 20 at 1-3; ECF No. 21; ECF No. 32 at 3-5; ECF No. 39; ECF No. 40 at 1; ECF No. 48 at 2, 4, 6-7.

Petitioner also challenges the result of an unrelated prison disciplinary conviction. Pet. at 5; *see* ECF No. 18 at 1-2 (discussing disciplinary case # 2012277287). Broadly construing Petitioner's pleadings, it appears he alleges the following:

- 1) The charge was inappropriate and the punishment was unusual and extreme;
- 2) Denial of due process by changing Petitioner's cell assignment;
- 3) Deprivation of right to call witnesses;
- 4) Denial of assistance in preparation of the disciplinary hearing;
- 5) Denial of a fair and impartial decision maker; and
- 6) insufficient evidence.

Respondent has filed an answer and a supporting brief. Petitioner has filed voluminous supporting briefs and responses.

II. DISCUSSION

A. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

Any section 2254 petition filed after April 24, 1996 is subject to the mandates of the AEDPA. *See Lindh v. Murphy*, 521 U.S. 320 (1997). Amendments made to 28 U.S.C. § 2244 by the AEDPA read as follows:

(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 for the latest of –

(A) the date on which judgment became final by the conclusion of direct review or the expiration of 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.

28 U.S.C. § 2244(d)(1)-(2).

B. Limitations analysis

The AEDPA provides a one-year limitation period for state prisoners to proceed to federal court with their habeas corpus actions. *Id.* The limitation period typically begins running on the date which the judgment becomes final by the conclusion of direct review or the expiration of time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). A jury convicted Petitioner on July 20, 2009. Pet. at 2. He unsuccessfully appealed to the Tenth Court of Appeals,

then petitioned the Texas Court of Criminal Appeals for discretionary review. *See Sanchez v. State*, slip op. at 1-3; <http://www.search.txcourts.gov/Case.aspx?cn=PD-1184-10> (Texas Courts Online). The Court of Criminal Appeals denied the petition for discretionary review on February 2, 2011. *Id.* Petitioner did not seek certiorari from the U.S. Supreme Court, and the deadline for seeking such relief expired 90 days later on Tuesday, May 3, 2011. *See* Rules of the Supreme Court 13.1. As this date was “the conclusion of direct review or the expiration of time for seeking such review”, this date triggered the start of the one-year limitation period. 28 U.S.C. § 2244(d)(1)(A). In the absence of any tolling, the limitation period expired one year later on May 3, 2012. Petitioner filed this action on October 9, 2012, over five months too late.

Under 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 is pending shall not be counted toward the period of limitation. As discussed above, Petitioner did not properly file a § 11.07 state habeas corpus action challenging the two convictions under attack in the instant action. *See* SHCR WR-75,568-01 through -05.

While Petitioner has failed to properly raise the instant claims before the state courts, a thorough and very liberally construed review of Petitioner’s various actions before the Court of Criminal Appeals shows that three of his five actions could be conceivably argued to be collateral attacks upon the convictions at issue in this federal action.¹ *See* SHCR WR-75,568-01, -03 and -05. Even assuming, *arguendo*, that these three actions were “properly filed” collateral attacks, those actions pended for only 82 days in sum. *See* 75,568-01, -03 and -05; 28 U.S.C. §

¹Actions 75,568-02 and 75,568-04 dealt with convictions unrelated to those at issue in this federal habeas action. Case numbers 75,568-01, -03 and -05, however, attempt to attack the convictions challenged in this federal habeas.

2244(d)(2). Tolling Petitioner's limitation period for 82 days would extend his filing deadline to July 24, 2012. However, Petitioner filed his action on October 9, 2012, over two months after the expiration of the most generous possible interpretation of the limitation period.

Petitioner does not allege, nor do his pleadings suggest, the existence of any impediment to the filing of a state habeas action on this claim. 28 U.S.C. § 2244(d)(1)(B). Nor does Petitioner identify any new constitutional rule made retroactively applicable to habeas cases. 28 U.S.C. § 2244(d)(1)(C). Petitioner's claims are of the kind that, through the exercise of due diligence, would have been discovered before the conviction became final. 28 U.S.C. § 2244(d)(1)(D). Petitioner's conviction became final on May 3, 2011. Because no tolling is available to Petitioner, the limitation period expired one year later on May 3, 2012. Petitioner filed his action on October 9, 2012, over five months too late. Because of Petitioner's failure to promptly pursue his claims, the Court is barred from hearing the merits of his claims.

C. Actual innocence

Petitioner alleges that he is actually innocent, arguing that he has affidavits, witness statements, "account history," photographs, an eviction notice and other evidence that his attorney did not present at trial, and that this evidence would exonerate him. Am. Pet. at 7. In the context of federal habeas corpus, the term "actual innocence" applies to specific circumstances under which the AEDPA's statute of limitations may be tolled. Actual innocence is not a constitutional claim for habeas relief, per se; it is a gateway to habeas review of a procedurally defaulted claim. *House v. Bell*, 547 U.S. 518, 537 (2006). In other words, a convincing showing of actual innocence enables a habeas petitioner to overcome a procedural bar to consideration of

the merits of their constitutional claims, *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *House v. Bell*, 547 U.S. 518, 537 (2006).

In order to satisfy the actual innocence standard to allow habeas review of a defaulted claim, a petitioner “must show that it is more than likely than not that no reasonable juror would have convicted him in the light of new evidence.” *Schlup v. Delo*, 513 U.S. at 327. Federal courts should only apply an actual innocence exception after determining that no other avenue exists to allow federal review of the claim. *Dretke v. Haley*, 541 U.S. 386, 387 (2005). The Supreme Court has not resolved whether a prisoner may be entitled to habeas relief based on a freestanding actual-innocence claim, but it has recognized that a prisoner is “otherwise subject to the defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence.” *Herrera v. Collins*, 506 U.S. 390, 404-405.

Insofar as Petitioner seeks to circumvent the one-year limitation period, he misapplies the concept of actual innocence. Petitioner uses the term “actual innocence” in the colloquial sense, raising an independent claim that he possesses various exculpatory evidence of his innocence and that he is therefore “actually innocent”. Am. Pet. at 7. Again, in the context of federal habeas corpus, actual innocence is merely a vehicle to bring other, otherwise barred claims. It is not a stand-alone claim.

Further, even if Petitioner did correctly apply this term of art, he nonetheless fails to actually provide new evidence that would compel a reasonable juror to conclude that Petitioner was innocent had that evidence been presented at trial. *Schlup v. Delo*, 513 U.S. at 327. Petitioner has filed dozens of briefs attacking the weight of the evidence against him at trial or arguing that

the witnesses against him perjured themselves, but he presents no new, conclusive evidence in support of these assertions. *See, e.g.*, ECF Nos. 19, 20, 21, 22, 23, 31, 32, 39, 40, 48, 50, 55, 68, 69, 73, 76, 82, 96, 112 and 123. As such, Petitioner's actual innocence assertion is without merit, and this action remains barred by 28 U.S.C. § 2244(d).

D. Prison disciplinary case

On June 19, 2012, in disciplinary case number 2012277287, prison disciplinary officials found Petitioner guilty of committing an unsafe act that resulted in an injury. Pet. at 5. Prison officials assessed punishment of thirty days of recreation and commissary restriction, a reprimand, and a temporary suspension of visitation privileges. Prison Disciplinary Record ("DHR") at 2. Officials did not assign any other punishment or revoke any of Petitioner's previously accrued good time. *Id.* and Pet. at 5.

The Supreme Court has held:

[W]e recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Sandin v. Conner, 515 U.S. 472, 484 (1995)(citations omitted). "These interests are generally limited to state created regulations or statutes which affect the quantity of time rather than the quality of time served by a prisoner." *Madison v. Parker*, 104 F.3d 765, 767 (5th Cir. 1997). Thus, punishments such as commissary restriction, cell restriction, property restriction, time-

earning-class reductions, or solitary confinement of up to fifteen days do not rise to the level of a constitutional violation. *See Malchi v. Thaler*, 211 F.3d 953, 959 (5th Cir. 2000) (holding that thirty day cell restriction and loss of commissary privileges does not implicate due process); *see also Madison v. Parker*, 104 F.3d 765, 768 (5th Cir. 1997) (holding that thirty day cell restriction and loss of commissary privileges does not implicate due process). Additionally, the Fifth Circuit has held that inmates have neither a protectable property nor liberty interest in custodial classification or time earning class. *Mikeska v. Collins*, 900 F.2d 833, 836 (5th Cir. 1990),² *citing Moody v. Baker*, 857 F.2d 256 (5th Cir. 1988); *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997); *Malchi v. Thaler*, 211 F.3d 953, 959 (5th Cir. 2000).

Again, prison officials imposed punishment of thirty days of recreation and commissary restriction, a reprimand, and a temporary suspension of visitation privileges. None of these punishments impose an “atypical and significant hardship” on Petitioner, nor do they trigger any due process protection. Additionally, Petitioner concedes that prison officials did not revoke any of he previously-accrued good time. Pet. at 5. Accordingly, because the Petitioner has no federally protectable due process interest at stake, his habeas challenge to the disciplinary case should be dismissed.

¹*See Mikeska v. Collins*, 928 F.2d 126 (5th Cir. 1991) (per curiam opinion which, on rehearing, withdrew the opinion reported at 900 F.2d 833 (5th Cir. 1990) for reasons not related to those for which the case is cited here, and reinstated the reasoning set out in 900 F.2d 836-37).

E. Petitioner's Motion for Summary Judgment

Petitioner has filed what is ostensibly a motion for summary judgment. ECF No. 116. The intent of the Motion is unclear, but taken in context of the attachments, Petitioner appears to object to his sex offender counseling. *See id.* Because Petitioner's Motion does not discuss the issues raised in the instant habeas corpus action, the Motion is utterly insufficient and should be denied.

III. RECOMMENDATION

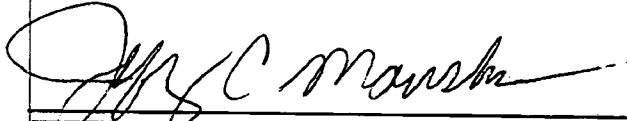
It is the recommendation of the undersigned that the instant petition be **DISMISSED** pursuant to Rule 4 of the Rules Governing Habeas Corpus Under Section 2254. It is further recommended that the Petitioner's Motion for Summary Judgment (ECF No. 116) be **DENIED**.

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53

(1985); *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED this 20th day of October, 2014.

A handwritten signature in black ink, appearing to read "Jeff C Manske", written over a horizontal line.

JEFFREY C. MANSKE,
UNITED STATES MAGISTRATE JUDGE

(147)

7/7
FILED

9/27/16

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

SEP 19 2016

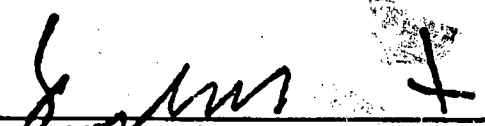
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY

**IN RE:
WACO DIVISION
CIVIL AND CRIMINAL CASES**

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It is hereby **ORDERED** that all pending civil and criminal cases assigned to the docket of U.S. District Judge Walter S. Smith shall be **TRANSFERRED** to the docket of U.S. District Judge Robert Pitman.

Signed this 19th day of September, 2016.



Honorable Orlando L. Garcia,
Chief United States District Judge