

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41381
USDC No. 4:12-CV-266



A True Copy
Certified order issued Dec 01, 2017

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

SAMUEL GASCA DURAN,

Petitioner-Appellant

v.

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

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

ORDER:

Samuel Gasca Duran, Texas prisoner # 1529734, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his jury trial conviction for aggravated sexual assault of a child. Duran argues that he was prosecuted after the statute of limitations had expired, in violation of the Ex Post Facto Clause. He complains that the error was due to the State's unconstitutional application of amendments to the statute of limitations. Duran disputes the alleged date of the offense and asserts that the trial court instructed the jury to rely on the wrong version of the statute of limitations, thus relieving the State of its burden to prove that his offense occurred during the limitations period. Duran

also argues that the district court did not allow him to present his claims concerning the statute of limitations through his claims of ineffective assistance of counsel, in violation of *Trevino v. Thaler*, 113 S. Ct. 1911 (2013).

A COA may be issued “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To meet that standard, the applicant must “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Duran has not made the requisite showing. His motion for a COA is DENIED. His motion to proceed in forma pauperis on appeal is also DENIED.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

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

SAMUEL GASCA DURAN, #1529734

VS.

DIRECTOR, TDCJ-CID

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CIVIL ACTION NO. 4:12cv266

POSTJUDGMENT ORDER

Petitioner filed a motion for reconsideration (de#34) following final judgment in this case. The Fifth Circuit has observed that “[a]ny motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label.” *Harcon Barge Co. v. D&G Boat Rentals, Inc.*, 784 F.2d 665, 669-70 (5th Cir. 1986) (en banc) (citing 9 Moore’s Federal Practice ¶ 204.12[1] at 4-67 (1985)). “Rule 59(e) serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence. . . . Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly.” *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (internal citations and quotations omitted). The Fifth Circuit recognizes that Rule 59(e) “favor[s] the denial of motions to alter or amend a judgment.” *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993).

If a motion for relief from judgment is filed within twenty-eight (28) days of final judgment, the motion should be filed as a motion under Rule 59 rather than Rule 60. Fed. R. Civ. P. 59(e); *Ford v. Elsbury*, 32 F.3d 931, 937 (5th Cir. 1994) (citing *Lavespere v. Niagara Mach. & Tool Works, Inc.* 910 F.2d 167, 173 (5th Cir. 1990)). If the motion is served after that time, it falls under Rule 60(b). Fed. R. Civ. P. 60(b). The instant motion was filed 28 days after final judgment; thus, it is properly filed under Rule 59(e).

In his motion for reconsideration, Petitioner asserts that the judgment in this case is illegal because no District Judge was assigned to his case when the Magistrate Judge issued her Report and Recommendation. Petitioner is simply mistaken. The undersigned United States District Judge was assigned to this case on January 7, 2015, which was then referred to United States Magistrate Judge Christine A. Nowak on July 1, 2015.

Additionally, Petitioner complains that no hearing was held and that the conclusions of the Court followed Respondent's Response. Evidentiary hearings are not required in federal habeas corpus proceedings. *See* Rule 8, *Rules Governing § 2255 Cases in the United States District Courts*; *see also McCoy v. Lynaugh*, 874 F.2d 954, 966-67 (5th Cir. 1989). Quite the contrary, "to receive a federal evidentiary hearing, a petitioner must allege facts that, if proved, would entitle him to relief." *Wilson v. Butler*, 825 F.2d 879, 880 (5th Cir. 1987), *cert. denied*, 484 U.S. 1079 (1988). *See also Townsend v. Sain*, 372 U.S. 293, 312, 83 S. Ct. 745, 756, 9 L. Ed.2d 770 (1963). "This requirement avoids wasting federal judicial resources on the trial of frivolous habeas corpus claims." *Wilson*, 825 F.2d at 880. Movant fails to show that he was entitled to an evidentiary hearing. *See United States v. Auten*, 632 F.2d 478, 480 (5th Cir. 1980) (noting that mere conclusory allegations are not sufficient to support a request for an evidentiary-hearing). Further, the Court examined the pleadings of both parties and made its legal conclusions.

Petitioner also claims that the Magistrate Judge denied him the opportunity to file objections. Petitioner's claim is disingenuous. A review of the record shows that the Court granted two extensions for objections. The Court did not abuse its discretion simply because the extensions granted were not as lengthy as Petitioner requested. The Court may achieve the orderly and

expeditious disposition of its docket. *Anthony v. Marion County Gen. Hosp.*, 617 F.2d 1164, 1167 (5th Cir. 1980).

Petitioner next asserts he is entitled to relief based on *Trevino v. Thaler*, — U.S. —, 133 S. Ct. 1911, 185 L. Ed.2d 1044 (2013), concerning his statute of limitations claim. M.G., the sexual assault victim, was seventeen years old when she testified on August 26, 2008. In his § 2254 petition, Petitioner asserts that he was prosecuted after the statute of limitations had run, presumably because Petitioner claims the sexual assault occurred in 1997 – eleven years prior to M.G.’s testimony. However, the state habeas court found that this claim was defaulted because Petitioner failed to challenge the timeliness of the indictment on direct appeal. Although defaulted, the state habeas court further determined that, even if Petitioner had challenged this issue on direct appeal, his assertion was erroneous. The limitations period at that time – ten years from the complainant’s eighteenth birthday – would not have expired until M.G.’s twenty-eighth birthday. She testified when she was seventeen years old. Thus, the claim, although procedurally defaulted, was also found to be without merit.

Further, the limitations claim, a statutory claim, is not cognizable in habeas proceedings. *See, e.g., Ex parte Long*, 910 S.W.2d 485, 487 (Tex. Crim. App. 1995). Habeas corpus is reserved for those instances in which there is a judicial defect in the trial court that renders the judgment void, or for denials of fundamental or constitutional rights. *Ex parte Sanchez*, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996). When a state court denies collateral relief due to a procedural default, as what happened in this case, federal courts are barred from determining the merits of such defaulted claims in a federal petition for writ of habeas corpus. *See Sawyer v. Whitley*, 505 U.S. 333, 338, 112 S. Ct. 2514, 2518, 120 L. Ed.2d 269 (1992). However, *Trevino* established that when a state’s procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a

defendant will have a meaningful opportunity to raise an ineffective-assistance-of-trial-counsel claim on direct appeal, procedural default will not bar a federal habeas court from hearing it. *Trevino*, 133 S. Ct. at 1921. But as noted above, the record shows that Petitioner raised the limitations issue in his state habeas action, it was considered, and the Texas Court of Criminal Appeals concluded that it was without merit. Thus, Petitioner had a meaningful opportunity to raise his ineffective assistance of trial counsel claim. *Trevino* offers no relief in this case.

Additionally, Petitioner complains that the statutory limitations issue violates the Ex Post Facto Clause. Article I, § 10, cl. 1 of the United States Constitution prohibits the states from passing any “ex post facto law.” The Ex Post Facto Clause is directed at laws that “retroactively alter the definition of crimes or increase the punishment for criminal acts.” *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 2719, 111 L. Ed.2d 30 (1990). The Supreme Court has rejected the argument that the Ex Post Facto Clause prohibits “any legislative change that has any conceivable risk of affecting a prisoner’s punishment.” *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 508, 115 S. Ct. 1597, 1602, 131 L. Ed.2d 588 (1995). Instead, the clause forbids only those retroactively applied laws that “produce a sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Id.*, 514 U.S. at 509, 115 S. Ct. at 1603. New procedures that create only a speculative and attenuated risk of increasing the measure of punishment does not violate the Ex Post Facto Clause. *Id.*, 514 U.S. at 508-09, 115 S. Ct. at 1603.

On or about May 1, 1999, when the sexual assault occurred, the law made it a crime to commit sexual assault of a child younger than fourteen years of age. The limitation period in effect on May 1, 1999, was “ten years from the 18th birthday of the victim.” Tex. Code Crim. P. art. 12.01(5)(B) (West 1999). Thus, prosecution of the crime had to occur before the complainant’s twenty-eighth

birthday. As noted before, M.G. was seventeen years old when she testified. Moreover, Petitioner's claim before the state habeas court was that his conviction and sentence was time-barred from prosecution based on "State and Federal Due Process of Law." In the instant federal case, Petitioner changed his claim and cites to *Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446, 156 L. Ed.2d 544 (2003), which stands for the proposition that prosecution after the limitations period could violate the Ex Post Facto Clause. Accordingly, Petitioner is also not entitled to relief based on the Ex Post Facto claim because the abuse-of-the-writ doctrine would prevent him from returning to state court and exhausting the claim under *Stogner*.

Finally, Petitioner fails to show that his procedural bar of prosecutorial misconduct was overcome by *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed.2d 397 (1986) (recognizing that in an "extraordinary case," a narrow exception to the cause and prejudice test would be one showing the continued incarceration of one actually innocent). He fails to meet the narrow exception. He has not shown a constitutional violation that probably resulted in the conviction of one who is actually innocent. *Id.*, 477 U.S. at 496, 106 S. Ct. at 2649. In sum, Petitioner simply reiterates issues that he raised in his petition, but he fails to show manifest errors of law or fact. *Templet*, 367 F.3d at 479. Accordingly, it is

ORDERED that Petitioner's Motion for Reconsideration (de#34) is **DENIED** after conducting a *de novo* review of the case. All motions not previously ruled upon are **DENIED**.

SIGNED this 30th day of August, 2016.


AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE