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PETITION FOR WRIT OF CERTIORARI

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OPINION

FIFTH CIRCUIT COURT OF APPEALS

(DECEMBER 4, 2017)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20009
USDC No. 4:16-CV-3641



A True Copy
Certified order issued Dec 04, 2017

Style W. Cayer
Clerk, U.S. Court of Appeals, Fifth Circuit

JAMES ZARYCHTA, JR.,

Petitioner-Appellant

v.

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

Respondent-Appellee

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

ORDER:

James Zarychta, Jr., Texas prisoner # 737586, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition for lack of jurisdiction. In his petition, Zarychta challenged his jury trial conviction for capital murder and the resulting sentence of life in prison. Zarychta argues that the district court erred by construing his 28 U.S.C. § 2241 application as a successive § 2254 petition.

A COA may issue "only if the applicant has made 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). Where a district court has denied a request for habeas relief on procedural grounds, the prisoner must show "that jurists

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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.” *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Zarychta has failed to make the requisite showing. *See id.*; *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000). Moreover, he fails to raise a tenable actual innocence claim. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013).

In addition, in light of the repeated frivolous nature of Zarychta’s prior filings he is CAUTIONED that the continued filing of frivolous, repetitive, or otherwise abusive pleadings will invite the imposition of sanctions, which may include dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court’s jurisdiction.

COA DENIED; SANCTION WARNING ISSUED.

/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE

ENTERED

December 15, 2016

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JAMES ZARYCHTA, JR.,
(TDCJ-CID #737586)

Petitioner,

VS.

LORIE DAVIS,

Respondent.

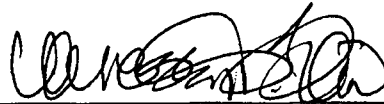
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CIVIL ACTION NO. H-16-3641

ORDER OF DISMISSAL

For the reasons stated in this court's Memorandum on Dismissal entered this date, this civil action is DISMISSED without prejudice.

SIGNED at Houston, Texas, on Dec 14, 2016.



VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

ENTERED

December 15, 2016

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**JAMES ZARYCHTA, JR.,
(TDCJ-CID #737586)

Petitioner,

VS.

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CIVIL ACTION NO. H-16-3641

MEMORANDUM ON DISMISSAL

James Zarychta, Jr. has filed a petition for habeas corpus relief under 28 U.S.C. § 2254 challenging a 1995 state conviction. In the 272nd Judicial District Court of Brazos County, Texas, a jury found Zarychta guilty of the felony offense of capital murder on January 30, 1995. (Cause Number 23,364-272). The Fourteenth Court of Appeals affirmed Zarychta's conviction on March 15, 2001. The Texas Court of Criminal Appeals refused his petition for discretionary review on October 24, 2001.

On March 3, 2005, Zarychta filed a federal petition for a writ of habeas corpus, Civil Action Number 4:05-0699, collaterally attacking his 1995 conviction for capital murder. On March 17, 2005, this court denied Zarychta's claims as time-barred.

In the instant federal petition filed on December 8, 2016, Zarychta challenges the same 1995 conviction for capital murder. (Docket Entry No. 1, Petition for a Writ of Habeas Corpus, p. 2).

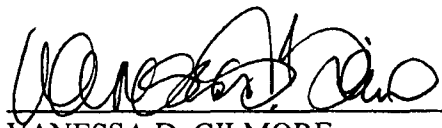
A district court may raise on its own the issue of whether a habeas corpus petition is successive. *Rodriguez v. Johnson*, 104 F.3d 694, 697 (5th Cir. 1997). The federal court dismissed

Zarychta's earlier federal petition, Civil Action Number 4:05-0699, as time-barred. The dismissal of a § 2255 petition as untimely under AEDPA is a "permanent and incurable" bar to federal review of the merits of the claim. The bar is permanent because, unlike cases in which a habeas or § 2255 petition is dismissed without prejudice for failure to exhaust or as premature, a time-bar cannot be corrected. A case dismissed as time-barred under AEDPA is an adjudication on the merits that makes a second petition challenging the same conviction or sentence successive. *See In re Flowers*, 595 F.3d 204 (5th Cir. 2009).

This court lacks jurisdiction to consider Zarychta's petition as it is a "successive" application governed by 28 U.S.C. § 2244(b)(3)(A) (1998), which requires that the Fifth Circuit authorize the district court to consider the application before it is filed in the district court. The statute states: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." Before Zarychta can file a second or successive application in this court, he must file a motion for an order authorizing this court to consider his successive application in the United States Court of Appeals for the Fifth Circuit. There is no indication that the United States Court of Appeals for the Fifth Circuit has authorized this court to consider Zarychta's successive application. Zarychta indicates that the Fifth Circuit has denied at least two motions for authorization to file a successive federal petition. (Docket Entry No. 1, p. 5). This court lacks jurisdiction to consider Zarychta's habeas claims. Zarychta's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is dismissed for lack of jurisdiction. Zarychta's constructive motion to proceed *in forma pauperis*. (Docket Entry No. 1), is GRANTED. Any remaining pending motions are denied as moot.

No Certificate of Appealability will issue. The showing necessary for a Certificate of Appealability is a substantial showing of the denial of a constitutional right. *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000) (citing *Slack v. McDaniel*, 429 U.S. 473, 483 (2000)). An applicant makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further. See *Clark v. Johnson*, 202 F.3d 760, 763 (5th Cir. 2000). When, as here, the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a Certificate of Appealability should not issue unless the prisoner shows, at least, 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. *Rudd v. Johnson*, 256 F.3d 317, 319 (5th Cir. 2001) (citing *Slack*, 529 U.S. at 484). Zarychta has not made the necessary showing. A Certificate of Appealability is denied.

SIGNED at Houston, Texas, on Dec. 14, 2016.


VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE