

A P P E N D I X

A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10078

MARCUS LIONEL SCOTT,

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 Northern District of Texas

O R D E R:

Marcus Lionel Scott, Texas prisoner # 00875643, seeks a certificate of appealability (COA) to appeal the district court's dismissal, as time barred, of his 28 U.S.C. § 2254 petition challenging his capital murder conviction. Scott seeks leave to appeal in forma pauperis (IFP).

This court has held that *Missouri v. Frye*, 566 U.S. 134 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012), “did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context.” *In re King*, 697 F.3d 1189 (5th Cir. 2012). Scott concedes this point but argues that his discovery of *Frye* and *Cooper* forms the factual predicate of his claim because he believed until then that ineffective assistance of counsel during plea negotiations was not a cognizable claim.

Because Scott has not demonstrated “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling,” his motion for a COA is DENIED. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Scott’s motion for leave to proceed IFP on appeal is also DENIED.



Certified as a true copy and issued
as the mandate on Jan 19, 2018

Attest:

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

Gregg J. Costa

GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

A P P E N D I X

B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARCUS LIONEL SCOTT,
(TDCJ No. 875643),

Petitioner,

VS.

LORIE DAVIS, Director, Texas
Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

CIVIL ACTION NO.

3:16-CV-2405-G (BN)

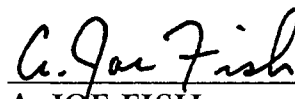
JUDGMENT

This action came on for consideration by the court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED, ADJUDGED** and **DECREED** that petitioner's application for writ of habeas corpus is **DISMISSED** with prejudice as time-barred pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

The clerk shall transmit a true copy of this judgment and the order accepting the findings, conclusions, and recommendation of the United States Magistrate Judge to petitioner and to the Texas Attorney General's Office.

December 16, 2016.



A. JOE FISH

Senior United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARCUS LIONEL SCOTT,
(TDCJ No. 875643),

Petitioner,

VS.

LORIE DAVIS, Director, Texas
Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

CIVIL ACTION NO.

3:16-CV-2405-G (BN)

**ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND
RECOMMENDATION OF THE UNITED STATES MAGISTRATE
JUDGE AND DENYING A CERTIFICATE OF APPEALABILITY**

The United States Magistrate Judge made findings, conclusions, and a recommendation in this case. An objection was filed by petitioner. The district court reviewed *de novo* those portions of the proposed findings, conclusions, and recommendation to which objection was made, and reviewed the remaining proposed findings, conclusions, and recommendation for plain error. Finding no error, the court **ACCEPTS** the findings, conclusions, and recommendation of the United States Magistrate Judge.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the court **DENIES** a certificate of appealability. The court adopts and incorporates by reference the magistrate judge's findings, conclusions, and recommendation filed in this case in support of its finding that the petitioner has failed to show (1) that reasonable jurists would find this court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).*

* Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

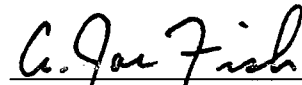
(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time

(continued...)

In the event that petitioner will file a notice of appeal, the court notes that he must pay the appellate filing fee or move for leave to proceed *in forma pauperis* on appeal.

SO ORDERED.

December 16, 2016.



A. JOE FISH

Senior United States District Judge

*(...continued)

to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Scott v. State, No. 05-99-00532-CR, 2000 WL 50067 (Tex. App. – Dallas Jan. 24, 2000).

And the Texas Court of Criminal Appeals (the “CCA”) refused Scott’s petition for discretionary review. *See Scott v. State*, PD-0904-00 (Tex. Crim. App. Aug. 30, 2000).

In 2001, the CCA denied his initial state habeas application without a written order, and, in 2016, the CCA denied his subsequent state petition as an abuse of the writ. *See Ex parte Scott*, WR-50,839-01, -02 (Tex. Crim. App.).

On an initial review of Scott’s federal habeas application, the Court recognized that the petition is likely time-barred and issued a questionnaire [Dkt. No. 4] to provide Scott fair notice of the limitations issue and to allow him to present his position as to that issue through a verified response to the questionnaire. The deadline to submit the response, September 21, 2016, passed more than two months ago without a response being filed. And Scott has not otherwise contacted the Court since he initiated this action.

Legal Standards

Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 (the “AEDPA”) establishes a one-year statute of limitations for federal habeas proceedings brought under 28 U.S.C. § 2254. *See* ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, Pub. L. 104-132, 110 Stat. 1214 (1996). The limitations period runs 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.

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 in “rare and exceptional circumstances.” *See, e.g., United States v. Riggs*, 314 F.3d 796, 800 n.9 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998)).

“Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.” *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (internal quotation marks and citation omitted). “[T]he principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect.” *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Unfamiliarity with the legal process does not justify equitable tolling. *Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999).

United States v. Kirkham, 367 F. App’x 539, 541 (5th Cir. 2010) (per curiam).

But “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. ___, 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). The United States Supreme Court recently reaffirmed “that the second prong of the equitable tolling test is met only where the circumstances that caused a litigant’s delay are both extraordinary *and* beyond its control.” *Id.* at 756 (emphasis in original).¹

The Supreme Court also has determined that the AEDPA statute of limitations can be overcome by a showing of “actual innocence.” See *McQuiggin v. Perkins*, 569 U.S. ___, 133 S. Ct. 1924, 1928 (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 1936 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)). That is, the new, reliable evidence must be sufficient to persuade the Court that “no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” *Id.* at 1928 (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*

¹ See also *Farmer v. D&O Contractors*, 640 F. App’x 302, 307 (5th Cir. 2016) (per curiam) (holding that because “the FBI did not actually prevent Farmer or any other Plaintiff from filing suit” but instead “advised Farmer that filing suit would have been against the FBI’s interest” and “that the RICO claims could be filed after the investigation concluded,” “[a]ny obstacle to suit was ... the product of Farmer’s mistaken reliance on the FBI, and a party’s mistaken belief is not an extraordinary circumstance” (citing *Menominee Indian Tribe*, 136 S. Ct. at 756-57)).

[*v. Zant*, 499 U.S. 467 (1991)], means that the person did not commit the crime.” (footnotes omitted; emphasis in original)).

Rule 4 Disposition

Under Rule 4 of the Rules Governing Section 2254 Cases, a district court may summarily dismiss a 28 U.S.C. § 2254 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.*

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 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.”

Kiser v. Johnson, 163 F.3d 326, 328 (5th Cir. 1999) (quoting 28 U.S.C. foll. § 2254 Rule 4 Advisory Committee Notes). In *Kiser*, clearly applicable here, the Fifth Circuit held that, “even though the statute of limitations provision of the AEDPA is an affirmative defense rather than jurisdictional, the magistrate judge and district court did not err by raising the defense *sua sponte*.” *Id.* at 329 (noting the district court’s “decision to do so was consistent with Rule 4 and Rule 11 of the Rules Governing Section 2254 cases, as well as the precedent of this Court”).

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) (quoting *Day v. McDonough*, 547 U.S. 198, 210 (2006);

alteration to original); *see also Ingram v. Director, TDCJ-CID*, No. 6:12cv489, 2012 WL 3986857, at *1 (E.D. Tex. Sept. 10, 2012) (a magistrate judge's report and recommendation also 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)).

Analysis

Scott's sole claim for relief is that he was denied constitutionally-effective assistance of counsel "during the negotiation and consideration of a plea offer." Dkt. No. 3 at 6. And he alleges that the current habeas application is timely because the constitutional right he asserts was not available to him until the United States Supreme Court decided *Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 566 U.S. ___, 132 S. Ct. 1399 (2012). He therefore bases the timeliness of the application on 28 U.S.C. § 2241(d)(1)(C).

But the United States Court of Appeals for the Fifth Circuit has held "that *Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context." *In re King*, 697 F.3d 1189, 1189 (5th Cir. 2012) (per curiam) (citing *United States v. Rich*, 141 F.3d 550, 554 (5th Cir. 1998)); *see also Russell v. Stephens*, No. 4:15-cv-67-A, 2016 WL 1756910, at *2 (N.D. Tex. Apr. 28, 2016).

And, to the extent that Scott asserts that his discovery of *Cooper* and *Frye* in 2015 is the timeliness trigger, *see* Dkt. No. 3 at 9; *see also* 28 U.S.C. § 2241(d)(1)(D), his learning of those two decisions cannot "serve as the factual, as opposed to the legal,

predicate for [his] claims within the meaning of subsection (D),” *Russell*, 2016 WL 1756910, at *2 (citing *Lo v. Endicott*, 506 F.3d 572, 575-76 (7th Cir. 2007); *Shannon v. Newland*, 410 F.3d 1083, 1088 (9th Cir. 2005)).

The current Section 2254 application is therefore due to be denied as untimely absent equitable tolling. But equitable tolling does not save this petition from the statute of limitations because Scott has not carried his “burden ... to show rare, exceptional, or extraordinary circumstances beyond his control that made it impossible for him to timely file” his Section 2254 habeas application. *Montes v. United States*, Nos. 3:13-cv-1936-K & 3:09-cr-286-K (4), 2014 WL 5286608, at *3 (N.D. Tex. Oct. 15, 2014) (citations omitted); *see also Menominee Indian Tribe*, 136 S. Ct. a 755-56; *Holland*, 560 U.S. at 649; *Farmer*, 2016 WL 672565, at *4.

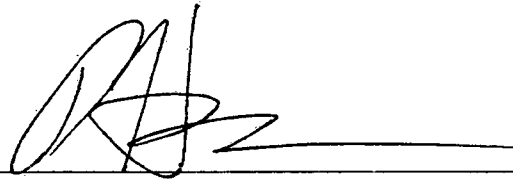
Recommendation and Direction to the Clerk of Court

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the Court should dismiss the application for a writ of habeas corpus with prejudice because it is time-barred. The Court also should direct that the Clerk of Court serve any order adopting this recommendation on the Texas Attorney General.

The Clerk of Court is DIRECTED to 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 and will be directed to the attention of Edward L. Marshall, Chief, Criminal Appeals Division, Texas Attorney General’s Office. *See* RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, RULE 4.

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: December 2, 2016

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 AppealsFIFTH CIRCUIT
OFFICE OF THE CLERKLYLE W. CAYCE
CLERKTEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

February 05, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 17-10078 Marcus Scott v. Lorie Davis, Director
USDC No. 3:16-CV-2405

The court has denied appellant's motion for an extension of time
to file rehearing/reconsideration.

Sincerely,

LYLE W. CAYCE, Clerk

Claudia N. Farrington

By: _____

Claudia N. Farrington, Deputy Clerk
504-310-7706

Mr. Marcus Lionel Scott