Appendix A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 11, 2025
Lyle W. Cayce
Clerk

No. 24-40497

GIFFORD JOHNSON, III,

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. 3:23-CV-190

UNPUBLISHED ORDER

Before SMITH, GRAVES, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Gifford Johnson, III, Texas prisoner # 01736258, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging his conviction of murder. The district court denied and dismissed his petition after concluding that it was time

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barred. Johnson challenges that ruling by asserting that his actual innocence serves as a gateway to the consideration of his § 2254 claims.

To obtain a COA, Johnson must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 483 (2000). As the district court dismissed his petition on procedural grounds, Johnson is required to demonstrate "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*, 529 U.S. at 484.

Johnson has not made the requisite showing. Accordingly, his motion for a COA is DENIED. In light of Johnson's failure to make the COA showing, we do not reach whether the district court erred by denying an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

No. 3:23-cv-190

GIFFORD JOHNSON, III, TDCJ #01736258, *PETITIONER*,

v.

BOBBY LUMPKIN, *RESPONDENT*.

MEMORANDUM OPINION AND ORDER

JEFFREY VINCENT BROWN, *UNITED STATES DISTRICT JUDGE*.

State inmate Gifford Johnson, III, proceeding *pro se*, filed a petition for a federal writ of habeas corpus under 28 U.S.C. § 2254, seeking relief from his state-court conviction and sentence for murder. Dkt. 1. Respondent Bobby Lumpkin answered and provided a copy of the state-court records. Dkts. 10, 11. Johnson filed a reply. Dkt. 16. Having considered the petition, the answer and reply, all matters of record, and the applicable legal authorities, the court determines that the petition should be dismissed for the reasons that follow.

I. BACKGROUND

In August 2011, a jury found Johnson guilty of one count of murder in Galveston County Cause Number 10CR0548. Dkt. 11-1 at 267-71. Johnson pleaded true to one enhancement, and the court sentenced him to life in prison on August

12, 2011. *Id.* Johnson's conviction and sentence were affirmed on appeal. *See Johnson v. State*, No. 01-11-00820-CR, 2013 WL 4680360 (Tex. App.—Houston [1st Dist.] Aug. 29, 2013, no pet.) (*mem. op., not designated for publication*). Johnson filed a petition for discretionary review (PDR) with the Texas Court of Criminal Appeals, Dkt. 11-22, but it was stricken on January 15, 2014, for failing to comply with Texas Rule of Appellate Procedure 9.4(i)(3). Dkt. 11-23. The Court of Criminal Appeals gave Johnson 30 days in which to file a conforming PDR, *id.*, but Johnson did not do so.

On May 9, 2018, Johnson filed an application for a state writ of habeas corpus, alleging, among other claims, that appellate counsel provided ineffective assistance by not filing a conforming PDR. Dkt. 11-32 at 4-23. On September 12, 2018, the Court of Criminal Appeals granted relief on Johnson's application to the extent that it gave him leave to file an out-of-time PDR. Dkt. 11-34; *see also Ex parte Johnson*, No 01-11-00820-CR, 2018 WL 4344430 (Tex. Crim. App. Sept, 12, 2018) (*mem. op., not designated for publication*). The Court of Criminal Appeals dismissed Johnson's substantive claims as premature. *Id.*

Johnson filed his *pro se* PDR on September 25, 2018. Dkt. 11-28. On November 7, 2018, the Court of Criminal Appeals refused Johnson's PDR. Dkt. 11-29. Johnson did not seek further review in the United States Supreme Court. Dkt. 1 at 3.

On November 15, 2018, Johnson filed his second application for a state writ

of habeas corpus, seeking a ruling on the substantive claims that had been previously dismissed as premature. Dkt. 11-36 at 4-25. The state habeas trial court entered findings of fact and conclusions of law, recommending that relief be denied on the merits. *Id.* at 142-50. On April 17, 2019, the Court of Criminal Appeals denied the application without written order on the trial court's findings without a hearing. Dkt. 11-37; *Ex parte Johnson*, Writ No. 88,735-02.

On January 10, 2022, Johnson filed a third application for a state writ of habeas corpus, contending that he had discovered new evidence showing that his trial counsel had lied during the proceedings on Johnson's second habeas application. Dkt. 11-39 at 3-20. The state habeas trial court entered findings of fact and conclusions of law, recommending that the application be dismissed. *Id.* at 135-37. On June 29, 2022, the Court of Criminal Appeals dismissed Johnson's third application as a subsequent application. Dkt. 11-40.

On June 19, 2023, Johnson filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 to start these federal proceedings. Dkt. 1. In that petition, he raised one claim of "actual innocence," one claim of ineffective assistance of counsel during jury selection, and one claim of ineffective assistance of counsel based on prosecutorial misconduct. *Id.* at 6-7. Concerning the timeliness of his petition, Johnson alleged that his "new" evidence shows that trial counsel "lied" during the earlier state habeas proceedings. *Id.* at 9. He asks this court to hold an evidentiary hearing on his claims and grant him relief. *Id.* at 7.

The respondent filed an answer, contending that Johnson's petition is untimely and does not fall within any of the exceptions to the limitations period. Dkt. 10. Johnson filed a reply, contending that the limitations period should start to run on the date he obtained the new evidence and that, alternatively, his actual innocence excuses his untimely filing. Dkt. 16.

II. DISCUSSION

A. One-Year Limitations Period

Johnson's petition is governed by 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, which the respondent raised in his answer and which he contends requires dismissal of Johnson's petition as time-barred. Dkt. 10 at 10-15.

Because Johnson challenges a state-court judgment, his AEDPA limitations period presumptively 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 Johnson's conviction became final for purposes of federal habeas review on February 5, 2019, the date on which his time to seek review in the United States Supreme Court expired after the denial of his authorized out-of-time PDR.[1] *See Roberts v. Cockrell*, 319 F.3d 690, 693 (5th Cir. 2003) (providing that a state prisoner's conviction becomes final for purposes of § 2244 when the time to file a petition for writ of certiorari in the Supreme Court has expires); *see also* SUP. CT. R. 13(1) (providing that a petition for certiorari seeking review of a state-court judgment subject to discretionary review must be filed within 90 days after entry

[1]"[W]here a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet 'final' for purposes of § 2244(d)(1)(A)." *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009). Instead, the judgment becomes final at the conclusion of the proceedings relating to those out-of-time proceedings, including an authorized out-of-time PDR. *Id.*; *see also Womack v. Thaler*, 591 F.3d 757, 757-58 (5th Cir. 2009) (per curiam) (concluding that the time for filing a § 2254 petition "began to run after the conclusion of proceedings relating to [the petitioner's] out-of-time PDR").

of the order denying discretionary review). Under § 2244(d), the deadline for Johnson to file a timely federal habeas petition was one year later, on February 5, 2020. But Johnson did not file his federal habeas petition until June 19, 2023—more than three years after the limitations period had expired. His claims are therefore time-barred unless a later accrual date applies.

Under § 2244(d)(2), the time during which a properly filed application for state habeas relief or other collateral review is pending is not counted toward the limitations period. *See Artuz v. Bennett,* 531 U.S. 4, 5 (2000). Johnson filed his state habeas application on November 15, 2018—before the expiration of the federal limitations period—and it was denied on April 17, 2019.[2] Johnson is therefore entitled to 153 days of statutory tolling due to the pendency of this state habeas application, extending the limitations period for his federal habeas petition until July 7, 2020. Johnson's June 19, 2023, federal habeas petition was filed almost three years outside this limitations period even after accounting for statutory tolling.

Johnson filed a third application for a state writ of habeas corpus on

[2]Although this was Johnson's second-in-time application, it was not considered a successive application. *See Ex parte Santana*, 227 S.W.3d 700, 703-04 (Tex. Crim. App. 2007) ("[W]hen an initial application presents claims challenging the validity of the prosecution or the judgment of guilt and presents a claim concerning the denial of the right to appeal and this Court grants an out-of-time appeal while dismissing the remaining grounds for relief, the initial application does not qualify as an application that challenged the conviction for purposes of [Texas Code of Criminal Procedure article 11.07] Section 4(a)." (*citing Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997))).

January 10, 2022. Dkt. 11-39 at 3-20. This application, filed eighteen months after the federal limitations period had already expired, does not revive or extend the already expired limitations period, nor does it provide for additional statutory tolling. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Johnson's June 2023 federal petition is therefore time-barred unless another exception applies.

In his petition, Johnson alleges that the timeliness of his petition should be governed by § 2244(d)(1)(D), which starts the one-year limitations period on the date that the factual basis for his claims was discovered or could have been discovered with the exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1)(D). Even if the court were to agree, the record shows that Johnson knew of the factual basis of his current claims for more than one year before he filed his June 2023 federal petition.

Construed broadly, Johnson's federal petition raises the following five claims:

1. Trial counsel provided ineffective assistance by failing to use Johnson's 1999 arm injury as a defense by offering evidence that the injury would have physically prevented Johnson from killing the victim in the manner described by the medical examiner. Johnson contends that newly obtained photos of his injuries and scars rebut trial counsel's assertion in the state habeas proceedings that he did not know about Johnson's injury.

2. Trial counsel provided ineffective assistance by failing to interview witness Rodney Stoll before trial and by failing to use his description of the person seen by the victim's car to show that Johnson did not match that description.

3. Trial counsel provided ineffective assistance by failing to interview Meshia Johnson, who could have testified concerning the reason she sent funds to

Johnson in Louisiana, which would have contradicted the state's theory that the payment and flight to Louisiana reflected Johnson's conscience of guilt.

4. Trial counsel provided ineffective assistance during jury selection by failing to strike, either for cause or peremptorily, prospective jurors who worked at the courthouse, who knew police officers, and who had family members who had been murdered.

5. Trial counsel provided ineffective assistance by failing to object to the prosecutor's improper comments during closing arguments.

Dkt. 1 at 6-7. Assuming § 2244(d)(1)(D), applies, the limitations period for these claims began to run on "the date a petitioner is on notice of the facts which would support a claim, not the date on which the petitioner has in his possession evidence to support his claim." *In re Young*, 789 F.3d 518, 528 (5th Cir. 2015).

As to claims 1, 4, and 5, the alleged errors occurred at Johnson's trial, and Johnson knew, or with reasonable diligence could have known, the factual basis for those claims during his 2011 trial. In addition, Johnson raised claims 1, 4, and 5 in his original state habeas application filed in May 2018, establishing that he knew the factual basis for those claims at that time. Similarly, Johnson raised claim 2 in the state habeas application he filed on November 15, 2018, establishing that he knew the factual basis for that claim at that time. Because the record shows that Johnson knew the factual basis for these four claims almost five years before he filed his June 2023 federal petition, claims 1, 2, 4, and 5 are untimely even if the court considers the limitations period under § 2244(d)(1)(D).

As to claim 3, the record shows that Johnson knew of the factual basis for this claim no later than February 2020, when Meshia Johnson signed the affidavit

that Johnson now uses in support of his claims. Because Johnson knew the factual basis for this claim more than three years before he filed his June 2023 federal petition, this claim is untimely even if the court considers the limitations period under § 2244(d)(1)(D). Therefore, application of the limitations period under § 2244(d)(1)(D) does not make Johnson's federal petition timely filed, and it is time-barred unless another statutory exception applies.

But Johnson does not allege facts showing that either of the other two statutory exceptions to the limitations period apply. He has not alleged 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). And he has not alleged facts to show that his claims are based on a newly recognized constitutional right. *See* 28 U.S.C. § 2244(d)(1)(C). Thus, the record does not establish a statutory basis to allow Johnson to avoid the effect of the limitations period. His petition is barred by limitations unless another exception applies.

B. Equitable Tolling

In some circumstances, equitable tolling can extend the federal habeas limitations period. But equitable tolling is an extraordinary remedy that applies only "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) (holding that equitable tolling applies, at the district

court's discretion, 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). 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. Thus, a "garden variety claim of excusable neglect" does not support equitable tolling. *Lookingbill v. Cockrell*, 293 F.3d 256, 264-65 (5th Cir. 2002). Neither does an unawareness of the law, lack of knowledge of filing deadlines, *pro se* status, or lack of legal training. *Felder v. Johnson*, 204 F.3d 168, 171-72 (5th Cir. 2000) (citing cases). The habeas petitioner has the burden of establishing that equitable tolling is warranted. *See Holland*, 560 U.S. at 649; *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (per curiam).

Even construing Johnson's habeas petition liberally, he has not shown that he is entitled to equitable tolling of the limitations period. He does not identify any extraordinary circumstance that prevented him from timely filing his federal petition. And his delay of over four years in filing his state habeas application after his PDR was stricken, combined with the additional four-year delay between the denial of his second state habeas application and the filing of his federal petition, compel the court to conclude that Johnson has not diligently pursued his claims.

Equitable tolling is not intended to benefit "those who sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 713 n.11 (5th Cir. 1999) (quoting *Covey v. Ark. River Co.*, 865 F.2d 660, 662 (5th Cir. 1989)), and Johnson's long periods of inactivity evince a lack of diligence. Johnson is not entitled to equitable tolling of the limitations period, and his petition is time-barred absent another legal basis for extending the limitations period or excusing him from it.

C. Actual Innocence

In an effort to avoid the effect of the limitations period, Johnson alleges that he should be excused from complying with the limitations period because he is actually innocent. Actual innocence, if proven, may excuse a failure to file a federal habeas petition with AEDPA's statute of limitations and provide a "gateway" to review otherwise time-barred claims. *McQuiggen v. Perkins*, 569 U.S. 383, 386 (2013). To be excused based on actual innocence, 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). In addition, the petitioner must "persuade[] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggen*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329). In making that determination, the court must consider "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be

admitted under rules of admissibility that would govern at trial." *House v. Bell*, 547 U.S. 518, 538 (2006). But "[e]vidence does not qualify as 'new' under the *Schlup* actual-innocence standard if it was always within the reach of [the petitioner's] personal knowledge or reasonable investigation." *Hancock v. Davis*, 906 F.3d 387, 390 (5th Cir. 2018) (cleaned up).

In his petition, Johnson does not identify evidence that qualifies as "new" under the *Schlup* and *Hancock* standard. While Johnson provides affidavit testimony from Stoll and Meshia Johnson that was not presented at trial, this testimony does not constitute "new" evidence because these witnesses testified at Johnson's 2011 trial and their proposed testimony was within Johnson's knowledge or a reasonable investigation. Likewise, the physical limitations from Johnson's 1999 arm injury were known to him at the time of trial, and the photos from his surgery do not constitute "new" evidence under the *Schlup* and *Hancock* standard as they were available to him with reasonable investigation. Similarly, the DNA report, which shows Johnson's DNA on the steering wheel of the victim's car but not the gear shift, does not constitute "new" evidence because that report was available, and in fact was actually introduced, during the 2011 trial. Dkt. 11-11 at 207-08. This lack of "new" evidence, standing alone, bars Johnson's claim of actual innocence.

But even if the affidavit testimony from Stoll and Meshia Johnson could be considered "new" evidence, it is not of such a nature as to persuade the court that

"in light of the new evidence, no juror, acting reasonably, would have voted to find [Johnson] guilty beyond a reasonable doubt." *McQuiggen*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329). Stoll testified at trial that he could not identify the man he saw standing at the rear of the victim's car on the evening of the murder, and he did not identify Johnson at trial. The jury was also aware that the clothing worn by the person Stoll saw standing by the victim's car was different from the clothing Johnson was wearing earlier on the night of the murder. Stoll's "new" testimony, which describes further differences between Johnson and the person standing by the victim's car on the evening of her murder, is not sufficiently material to lead the court to conclude that it is more likely than not that no reasonable juror would have convicted Johnson in light of this "new" testimony.

Similarly, Meshia Johnson testified that she sent money to Johnson by Western Union when he was in Louisiana. It was undisputed that Johnson was arrested after he returned to Texas. Meshia Johnson's "new" testimony that she sent the money specifically so that Johnson could afford to return to Texas is not of such a nature as to negate the state's evidence of flight or to conclude that it is more likely than not that no reasonable juror hearing the "new" testimony would vote to find Johnson guilty.

In sum, the evidence Johnson offers in support of his actual innocence claim fails to satisfy the demanding standard set forth in *Schlup* and *Hancock*.

Therefore, his actual-innocence claim fails to excuse the untimely filing of his federal petition, and his petition is dismissed as barred by 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 adverse to the petitioner.

A certificate of appealability will not issue unless the petitioner makes "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, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard, a 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 (cleaned up). A district court may deny a certificate of appealability, sua sponte, without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (per curiam).

After careful review of the record and the applicable law, the court concludes that reasonable jurists would not find its assessment of Johnson's claims debatable or wrong. Because Johnson does not allege facts showing that his claims could be resolved in a different manner, a certificate of appealability will not issue in this case.

IV. CONCLUSION AND ORDER

For the reasons stated above, the court orders as follows:

1. The petition for writ of habeas corpus filed by Gifford Johnson, III, Dkt. 1, is denied and this action is dismissed with prejudice.
2. All pending motions are denied as moot.
3. A certificate of appealability is denied.

The clerk will provide a copy of this order to the parties of record.

SIGNED on Galveston Island this 15 day of July, 2024.

JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

GIFFORD JOHNSON, III, Petitioner-Appellant, versus ERIC GUERRERO, DIRECTOR, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
2025 U.S. App. LEXIS 13259; 2025 LX 164388
No. 24-40497
May 30, 2025, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2025 U.S. App. LEXIS 1}Appeal from the United States District Court for the Southern District of Texas. USDC No. 3:23-CV-190.Johnson v. Guerrero, 2025 U.S. App. LEXIS 11458 (May 12, 2025)

Counsel Gifford Johnson, III, Petitioner - Appellant, Pro se, Rosharon, TX.
For Eric Guerrero, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent - Appellee: Cara Hanna, Assistant Attorney General, Office of the Attorney General, Austin, TX.

Judges: Before SMITH, GRAVES, and ENGELHARDT, Circuit Judges.

Opinion

ON PETITION FOR REHEARING EN BANC

UNPUBLISHED ORDER

Per Curiam:

Treating the petition for rehearing en banc as a motion for reconsideration (5th Cir. R.40 I.O.P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P.40 and 5th Cir. R.40), the petition for rehearing en banc is DENIED.