

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LEROY HENDERSON,
Petitioner,

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vs.

CIVIL ACTION H-06-0605

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS
DIVISION,
Respondent.

MEMORANDUM AND RECOMMENDATION

Leroy Henderson's petition for habeas corpus relief under 28 U.S.C. § 2254 has been referred to this magistrate judge for report and recommendation. It is recommended that Henderson's petition be denied.

I. BACKGROUND

Henderson is an inmate of the Texas Department of Criminal Justice serving twenty and fifty year sentences, running concurrently, for sexual assault of a child and aggravated sexual assault of a child. *See Ex parte Henderson*, Nos. 763936 and 763935 (263d Dist. Ct. Harris County, Texas, June 25, 1998). The Fourteenth Court of Appeals in Houston, Texas affirmed the convictions on March 2, 2000, rejecting Henderson's timely appeals. (Dkt. 11). Henderson's petition for discretionary review to the Texas Court of Criminal Appeals was initially granted but eventually dismissed on May 1, 2002 as improvidently granted. A motion for

rehearing was timely filed, but denied on June 12, 2002. *Id.* Henderson did not file a writ of certiorari with the United States Supreme Court.

Henderson attempted to collaterally attack his convictions with two separate state writ of habeas corpus applications filed July 11, 2003. Henderson claimed to be actually innocent of both convictions. The trial court entered findings of fact and recommended that both writs be denied. The Texas Court of Criminal Appeals agreed and denied the applications without written order.

Henderson filed his first federal petition for writ of habeas corpus in the Southern District of Texas (H-05-0103), bringing a collateral challenge of his conviction only for the sexual assault of his granddaughter Allison. U.S. District Judge Kenneth M. Hoyt dismissed Henderson's motion with prejudice, as time barred. Henderson then filed a separate federal petition for writ of habeas corpus in the Southern District of Texas (H-05-1072), bringing a collateral challenge of his conviction only for the aggravated sexual assault of another granddaughter, Trisha. U.S. District Judge Nancy F. Atlas dismissed Henderson's motion without prejudice, so he could pursue his claims of actual innocence at the state court level.

Henderson in turn filed two more state writs of habeas corpus applications on November 28, 2005, again challenging his two convictions. The two additional state applications were both dismissed as successive.

II. ANALYSIS

Henderson's current petition challenges both convictions. Because Henderson's previous federal petitions were filed separately and dismissed for different reasons, his two convictions must be analyzed separately.

A. Sexual Assault

At least four of the nine grounds cited in Henderson's petition challenge his sexual assault conviction pertaining to granddaughter Allison, specifically: (1) actual innocence based on a recanting affidavit by the complainant; (2) prosecutorial misconduct in relying upon perjured testimony; (3) lack of outcry by the complainant, a statutory predicate for the offense; and (4) ineffective assistance of counsel for not asserting the outcry defense.

This is Henderson's second habeas petition filed in the Southern District of Texas for that conviction; the first petition (H-05-0103) asserted most of these same claims and was dismissed with prejudice as time-barred. "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." 28 U.S.C. § 2244(b)(3)(A). A petition is not successive merely because it follows an earlier federal petition. *Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003). However, a subsequent

petition is successive when it “1) raises a claim challenging the petitioner’s conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of writ.” *Id.* at 836-37.

Henderson asserts that the recent Supreme Court decision in *House v. Bell*, 126 S.Ct. 2064 (2006), requires “any claim brought under an ‘actual innocence’ claim waives all [§]2244(b)(3) requirements.” (Dkt. 13, p. 1). But the holding of *House v. Bell* does not sweep so broadly.

House dealt with an exception to the general rule that, out of respect for the finality of state court judgments, federal habeas courts are closed to claims that state courts would consider defaulted. This “gateway” exception, articulated in *Schlup v. Delo*, 513 U.S. 298 (1995), holds that the state procedural default rule does not bar a federal habeas petition asserting constitutional claims when the petitioner makes a compelling showing of actual innocence. *House* refined and clarified the standard for reviewing such “actual innocence” claims, in a case involving newly-discovered exculpatory DNA evidence. In the course of its opinion, the Court rejected the State’s argument that two provisions of the 1996 AEDPA, §§ 2244(b)(2)(B)(ii) and 2254(e)(2), had superseded the *Schlup* actual innocence standard, because “[n]either provision addresses the type of petition at issue here – a first federal petition seeking consideration of defaulted claims based

on a showing of actual innocence.” 126 S.Ct. at 2078. But nothing in *House* remotely suggests that the statutory prerequisites for district court jurisdiction over a successive habeas claim, as delineated by § 2244, have been altered. In other words, the actual innocence gateway discussed by *House* does not apply to successive claims. Accordingly, the Supreme Court’s decision in *House* is of no help to Henderson here.

Henderson’s prior federal petition, H-05-0103, asserted the following claims: 1) actual innocence; 2) his conviction was obtained by improper use of perjured testimony; and 3) ineffective assistance of counsel. (Dkt. 11-2, pp. 15-16). Henderson’s present federal petition is successive because it reasserts either the same claims or claims that could have been raised in the prior federal petition. Because this portion of the petition is successive, and Henderson has not obtained an order from the court of appeals authorizing the district court to consider it, the court does not have jurisdiction to consider that portion of the petition, and it should be dismissed. *See Crone*, 324 F.3d at 836 (“§ 2244(b)(3)(A) acts as a jurisdictional bar to the district court’s asserting jurisdiction over any successive habeas petition until . . . [the Fifth Circuit] has granted the petitioner permission to file one.”).

B. Aggravated Sexual Assault

Henderson previously filed a petition for habeas corpus in the Southern District of Texas (H-05-1072) related to his aggravated sexual assault conviction pertaining to granddaughter Trisha. Because that petition was not decided on the merits, having been dismissed without prejudice for failure to exhaust claims at the state court level, the portion of the present petition related to the aggravated sexual assault conviction is not successive. *See Slack v. McDaniel*, 529 U.S. 473, 486-87 (2000).

Henderson challenges his aggravated sexual assault conviction on five grounds: (1) ineffective assistance of counsel in not presenting alibi evidence; (2) ineffective assistance of counsel in failing to present exculpatory evidence regarding complainants' credibility; (3) erroneous admission of extraneous offense evidence; (4) improper jury charge on reasonable doubt; and (5) lack of subject matter jurisdiction. For reasons explained below, this portion of the petition is time barred.

1. One-Year Statute of Limitations

Henderson's federal petition is governed by the amendments to the federal habeas corpus statutes contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244.

The AEDPA provides as follows:

(d)(1) A 1-year period of limitation shall apply to an application for 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 postconviction 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).

Here, the one-year deadline for Henderson to file his petition began 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.” § 2244(d)(1)(A). Henderson’s state appeals ran their course on June 12, 2002 when the Texas Court of Criminal Appeals denied Henderson’s motion for rehearing. Henderson did not seek a writ

of certiorari from the United States Supreme Court, thus the one-year deadline began to run on September 10, 2002, ninety days after entry of final judgment. SUP. CT. R. 13.1 (a petition for writ of certiorari must be filed within ninety days of entry of judgment.). Henderson had until September 10, 2003 to file his federal petition. His present federal petition was placed in the prison mailing system on February 4, 2006, well beyond the one-year limitations period. The petition is time barred unless statutory or equitable tolling applies.

2. Statutory Tolling

The time during which a properly filed application for state habeas corpus or other collateral review is pending shall not be counted toward the one-year limitations period. *See* 28 U.S.C. § 2244(d)(2). By the time Henderson filed his July 11, 2003 state habeas application related to this conviction, some 304 days had accrued toward the one-year limitations period. No time accrued toward the one-year limitations period during the pendency of this state application. Time began to accrue again when the state habeas application was denied on November 10, 2004. By the time Henderson filed a second state habeas application on November 28, 2005, a total of 687 days had accrued. Any statutory tolling during the second state habeas application does not help Henderson because he had far exceeded the one-year limitation period before it was filed.

Henderson offered no basis to invoke any of the other statutory tolling

provisions set out in 28 U.S.C. § 2244(d)(1)(B)-(D). Nor does Henderson's previous federal habeas petition (H-05-1072) affect the limitations analysis. The pendency of a prior federal habeas petition does not toll the one-year limitations period under 28 U.S.C. § 2244(d)(2). *Duncan v. Walker*, 533 U.S. 167, 181 (2001). Therefore, Henderson was long past the one-year period allowed by AEDPA when he placed his present federal habeas petition in the prison mailing system on February 4, 2006.

3. Equitable Tolling

“Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Equitable tolling is invoked primarily “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.” *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996); *Grooms v. Johnson*, 208 F.3d 488, 489-90 (5th Cir. 1999). Henderson has failed to adequately explain the substantial delays in his efforts leading up to the present federal habeas petition. Significantly, he has not alleged that the state actively misled him in any way, nor that any extraordinary circumstance impeded his efforts to file this petition.

While Henderson places emphasis on his “actual innocence” claim, the Fifth Circuit has held that such a claim does not in itself constitute a “rare and exceptional circumstance” that warrants application of the equitable tolling doctrine. *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000). In this connection, it should be stressed that the *Schlup/House* actual innocence exception is designed to be a gateway to federal court for claims procedurally barred in state court, rather than a gateway to bypass federally imposed limitations on such claims.

In any event, the prerequisites for an “actual innocence” gateway claim based on *House* are simply not present here.¹ Henderson has asserted no new evidence of actual innocence here. In fact, actual innocence is not among the grounds asserted in Henderson’s current challenge to the aggravated sexual assault conviction. The recanting complainant referred to in Henderson’s petition is Allison, who was the object of the other sexual assault conviction discussed in part II.A. above. Moreover, the record shows that Henderson’s actual innocence challenges to both convictions based on recanted testimony were actually considered on the merits on state habeas corpus review. (Dkt. 11-2, p. 25). These

¹ The required showing for an actual innocence gateway claim is stringent: “To establish the requisite probability that he was actually innocent, the petitioner must support his allegations with new, reliable evidence that was not presented at trial and must show that it was ‘more likely than not that no reasonable juror would have convicted him in the light of the new evidence.’” *Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

claims were therefore not procedurally forfeited under state law.

For all these reasons, Henderson's petition challenging the aggravated sexual assault conviction is untimely.

III. RECOMMENDATION

Henderson's petition related to the sexual assault conviction should be DISMISSED as successive, and the petition related to the aggravated sexual assault conviction should be DENIED as time barred.

The court further finds that Henderson has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack*, 529 U.S. at 484. Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* 28 U.S.C. § 636(b)(1)(C); Rule 8(b) of the Rules Governing Section 2254 Cases.

Signed at Houston, Texas on September 26, 2006.



Stephen Wm Smith
United States Magistrate Judge