IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-11017

United States Court of Appeals
Fifth Circuit
FILED
September 24, 2019
Lyle W. Cayce
Clerk

In re: ROBERT SPARKS,

Movant

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

O R D E R:

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

Nine days before his scheduled execution date on September 25, 2019, Sparks filed a motion in this court to authorize filing a successive federal habeas petition pursuant to 28 U.S.C. § 2244(b).[1] Since 2008, Sparks has been through state and federal proceedings concerning his capital crime and death sentence for the brutal murders of two boys. He never raised an *Atkins* claim alleging intellectual disability until late this summer.

No extended recap of the horrendous crime or criminal proceedings is necessary. Sparks murdered his two stepsons and their mother, and raped his two stepdaughters in the same vicious transaction. He was convicted and

[1] The timing of this last-minute filing is no accident, because this court's Local Rule 8.10, tailored to prevent last-minute capital habeas filings, requires petitioners to present their claims no later than eight days before a scheduled execution. Petitioner's counsel freely admits his timing of this premature, and untimely, petition was designed to evade the deadline.

sentenced to death in 2008, and his conviction was affirmed on direct appeal to the Texas Court of Criminal Appeals in 2010. The Supreme Court denied cert. in 2011. Sparks pursued a state habeas proceeding, was denied relief in the state trial court and on appeal, and cert. was again denied in 2012. During the pendency of the state habeas, Sparks filed his first federal habeas proceeding, which the court abated pending exhaustion in another round of state habeas. Following this excursion, the federal court considered and rejected Sparks's amended habeas petition. This court affirmed the district court's order denying relief in late 2018 and denied rehearing in January 2019. A petition for cert. following this court's decision remains pending in the Supreme Court.

The state requested and obtained the September 25 execution setting in June. In late July, Sparks, through his counsel Jonathan Landers and Seth Kretzer, filed an application for funding for a neuropsychologist and a stay of execution, which the district court denied. He also commenced a subsequent state court habeas proceeding premised on the theory that he is intellectually disabled and therefore ineligible for the death penalty. The Texas Court of Criminal Appeals dismissed the writ as an abuse yesterday, September 23, 2019.

Nevertheless, Sparks asks this court to approve his motion to file a successive federal habeas petition based solely on the *Atkins* claim. He contends that he has made a *prima facie* case supporting the prerequisites for a successive filing as either a new rule of constitutional law, made retroactive, that was previously unavailable, Section 2244(b)(2)(A), or previously unavailable facts that call into question the accuracy of his conviction for capital murder, Section 2244(b)(2)(B).

The state's response to Sparks's brief contends that he meets neither of these statutory criteria and in any event, his petition is untimely pursuant 28 U.S.C. § 2244(d)(1). For the following reasons, we DENY the application.

1. Sparks is unable to establish a *prima facie* case that his petition, even if exhausted, is based on a "new rule" of constitutional law, that was "previously unavailable" but made retroactively applicable to cases on collateral review. Sparks killed his victims long after *Atkins* had eliminated capital punishment for mentally disabled individuals. During his trial in 2008, Sparks's own expert testified that he was not so disabled.

He contends that in *Moore v. Texas*, 137 S. Ct. 1039 (2017), the Supreme Court rejected Texas's previous framework for determining intellectual disability in this context and thus facilitated a successive *Atkins* claim. This contention contradicts the Court's holding in *Shoop v. Hill*, 139 S. Ct. 504, 507–09 (2019). But even if we count *Moore* as the starting date for Sparks's realization that the former Texas guidelines for intellectual disability would not stymie his *Atkins* claim, the statutory time limit for asserting this claim is one year following *Moore*. 28 U.S.C. § 2244. Consequently, Sparks's delay in filing this application nearly three years after *Moore* is untimely. Section 2244(d)(1)(C).

2. Alternatively, Sparks contends that the "factual basis" for his post-*Moore* claim "could not have been discovered by the exercise of due diligence" until his current expert's re-evaluation of his old, pretrial testing. 28 U.S.C. §§ 2244(b)(2)(B)(i), (d)(1)(D). He attempts to claim that the experts' trial testimony from 11 years ago yielded uncertain results about his IQ and somehow eliminates any duty of diligence to have investigated an *Atkins* claim for more than a year after *Moore*. Aside from its lack of legal support, this argument is incoherent. Using *Moore* as the touchstone for his failure to reconsider intellectual disability ignores that the DSM-5 diagnostic protocol,

which loosened the basis for such findings, was published in May 2013. So, this petition falls six years after the alleged new factual predicate, rendering it five years untimely.

Sparks's invocation of *McQuiggin* to satisfy the additional prerequisite of 28 U.S.C. § 2244(b)(2)(B) is also unavailing, because that provision is directed to new facts that, if proven, would have shown Sparks not guilty of the underlying offense "by clear and convincing evidence." 2244(b)(2)(B)(ii); *McQuiggin v. Perkins,* 569 U.S. 383, 395–96 (2013); *see also Busby v. Davis,* 925 F.3d 699, 712 (5th Cir. 2019) (footnotes omitted). Sparks has not attempted to demonstrate actual innocence of the crime. And even if "actual innocence of the death penalty" suffices under *McQuiggin*,[2] a petitioner is still responsible for pursuing his claim within the AEDPA limitations period. *Henderson v. Thaler,* 626 F.3d 773. 781 (5th Cir. 2010).

3. We decline Sparks's request to remand the timeliness issue while granting him a further opportunity to expand on proof of his *Atkins* claim. Even if he had presented prima facie evidence of intellectual disability, such evidence cannot bootstrap a plainly untimely claim. Unlike other petitioners for which this court has granted remand to proceed with successive petitions based on *Atkins,* Sparks had proceedings pending in this court and the state courts throughout the evolution of the Supreme Court's approach to Texas's application of *Atkins* and when the DSM-5 was published.[3] He had ample time and opportunity to explore and properly raise an intellectual disability claim.

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[2] Throughout this opinion we refer to propositions asserted by Sparks with the conditional "even if." Doing so does not indicate that any of those propositions has any merit.

[3] *Cf. In re Johnson*, 935 F.3d 284, 293 (5th Cir. 2019) (amendment to first habeas petition in light of publication of DSM-5 was "not feasible" because the DSM-5 was published "only 17 days before" the petition was denied); *In re Cathey*, 857 F.3d 221, 230 (5th Cir. 2017) (judicial recognition of the Flynn Effect and the abandonment of rule-of-thumb for a maximum IQ level were not available at the time of the first petition and its disposition).

4. Because Sparks has failed to set up a basis for filing a successive habeas petition, we have no authority to grant a stay of execution.

Motion for Authorization to File is DENIED.

Motion for a Stay of Execution is DENIED.