

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

July 8, 2021

Lyle W. Cayce
Clerk

No. 19-40091
Summary Calendar

DAVID PEDDER,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:16-CV-203

Before CLEMENT, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

David Pedder, Texas prisoner # 01787993, appeals the time-bar dismissal of his 28 U.S.C. § 2254 petition, wherein he raised, inter alia, a claim that his trial counsel rendered ineffective assistance. Pursuant to this

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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court's order granting Pedder a certificate of appealability, he raises the following three claims on appeal: (1) Whether, for purposes of the actual innocence gateway of *McQuiggin v. Perkins*, new evidence must be newly discovered, previously unavailable evidence or if it includes reliable evidence that was available but not presented at trial; (2) Whether his evidence qualified as new; and (3) Whether the evidence was cumulative and whether, in light of all the evidence, "it is more likely than not that no reasonable juror would have" found him guilty. 569 U.S. 383, 386, 399 (2013) (internal quotation marks and citation omitted).

Actual innocence, if proved, permits a first-time petitioner like Pedder to overcome 28 U.S.C. § 2244(d)(1)'s limitations bar and initiate an untimely § 2254 proceeding. *See Perkins*, 569 U.S. at 386. To be credible, such claims require "new reliable evidence." *Floyd v. Vannoy*, 894 F.3d 143, 155 (5th Cir. 2018) (internal quotation marks and citation omitted). Although the Supreme Court has not yet defined the phrase for purposes of actual innocence claims, and we have not decided whether it requires "newly discovered, previously unavailable evidence, or, instead, evidence that was available but not presented at trial," we do not decide the question here. *Hancock v. Davis*, 906 F.3d 387, 389-90 & n.1 (5th Cir. 2018).

In support of his actual innocence claim, Pedder relies on numerous affidavits as well as a diagram and photographs of the business where the complainant testified that the assault occurred. The information contained in the diagram, photographs, and affidavits was within reach of Pedder's personal knowledge and reasonable investigation, particularly given his working or family relationships with certain affiants and that he remained employed at the business for the nearly two years that it took his case to go to trial. *See id.* Furthermore, in addressing whether an actual innocence claim is sufficient to overcome § 2244(d)(1)'s time bar, we have made no

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distinction between the treatment of ineffective assistance claims and other claims. *See id.* at 389-90.

Because Pedder failed to support his actual innocence gateway claim with new reliable evidence, the district court did not err in dismissing his § 2254 application as time barred. Accordingly, we do not address Pedder's claims further.

In light of the foregoing, the judgment of the district court is **AFFIRMED**.