

Westlaw

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179 Fed.Appx. 548, 2006 WL 1469280 (C.A.10 (Okla.))  
 (Not Selected for publication in the Federal Reporter)  
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**H**

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,  
 Tenth Circuit.  
 George James ALLEN, Petitioner-Appellant,  
 v.  
 Steve BECK, Warden, Respondent-Appellee.

No. 05-5168.  
 D.C. No. 04-CV-638-CVE.  
 May 16, 2006.

**Background:** Following state conviction for sexually assaulting a minor, petition for federal writ of habeas corpus was filed. The United States District Court for the Northern District of Oklahoma denied the petition and petitioner appealed.

**Holdings:** The Court of Appeals held that:

- (1) appellate counsel's failure to file application for post-conviction relief did not toll the one-year statute of limitations, and
- (2) claim of actual innocence based on newly discovered evidence was not ground for federal habeas relief.

Appeal dismissed.

West Headnotes

## **[1] Habeas Corpus 197 ↪ 603.16**

197 Habeas Corpus  
 197III Jurisdiction, Proceedings, and Relief  
 197III(A) In General  
 197k603 Limitations, Laches or Delay  
 197k603.16 k. Access and assistance.

Most Cited Cases  
 (Formerly 197k603)

Appellate counsel's failure to file application for post-conviction relief did not toll the one-year statute of limitations for filing habeas claim following state conviction for sexually abusing a minor; there was no constitutional right to counsel in collateral proceedings and there was an eight-year delay between conclusion of trial and filing of habeas petition. 28 U.S.C.A. § 2244(d).

## **[2] Habeas Corpus 197 ↪ 462**

197 Habeas Corpus  
 197II Grounds for Relief; Illegality of Restraint  
 197II(B) Particular Defects and Authority for Detention in General  
 197k462 k. Criminal liability; innocence.  
 Most Cited Cases

Claim of actual innocence based on newly discovered evidence was not ground for federal habeas relief in non-capital case absent a constitutional violation occurring in underlying proceeding.

**\*549** Nancy Elizabeth Connally, Diane L. Slayton, Asst. Attorney Gen., Office of the Attorney General, Oklahoma City, OK, for Respondent-Appellee.

Before KELLY, MCKAY, and LUCERO, Circuit Judges.

## **ORDER DENYING CERTIFICATE OF APPEALABILITY**

**\*\*1** George James Allen, a state prisoner proceeding pro se, requests a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. § 2254 habeas petition. For substantially the same reasons set forth by the district court, we **DENY** a COA and **DISMISS**.

Allen was convicted of two counts of sexually abusing a minor child. He was sentenced to consecutive prison terms that totaled one hundred twenty

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years. He appealed to the Oklahoma Court of Criminal Appeals ("OCCA"), and on December 19, 1995, his convictions were affirmed. Almost six years later, on January 2, 2001, Allen filed an application for post-conviction relief in the District Court of Tulsa County. Following an evidentiary hearing, the state district court denied relief on August 22, 2003. Allen appealed, and on June 18, 2004, the OCCA affirmed the district court. Allen then filed this § 2254 application on July 12, 2004, in federal district court. Respondent Beck opposed the petition, arguing that it was time-barred. Allen argued in response that the doctrine of equitable tolling justified his delay. The district court concluded that Allen's habeas petition was time-barred and dismissed. Having failed to secure a COA from that court, Allen now seeks a COA from this court.

FNI

FNI. Allen's petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"); as a result, AEDPA's provisions apply to this case. See *Rogers v. Gibson*, 173 F.3d 1278, 1282 n. 1 (10th Cir.1999) (citing *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997)). AEDPA conditions a petitioner's right to appeal a denial of habeas relief under § 2254 upon a grant of a COA. 28 U.S.C. § 2253(c)(1)(A). A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). This requires Allen to 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." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (quotations omitted). Because the district court denied Allen a COA, he may not appeal the district court's decision absent a grant of COA

by this court.

The statute of limitations for applications for a writ of habeas corpus is set forth in 28 U.S.C. § 2244(d). It states:

**\*550** (1) A 1-year period of limitation shall apply to an application for a 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 post-conviction 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.

Because this law went into effect on April 24, 1996, after Allen's conviction became final, Allen had until April 24, 1997 to file his petition. See *United States v. Hurst*, 322 F.3d 1256, 1260 (10th Cir.2003).

Under 28 U.S.C. § 2244(d)(2), the time during which a properly filed application for state post-conviction relief or other collateral review is

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pending does not count towards the one-year statute of limitations. However, Allen did not file his state application for post-conviction relief until January 2, 2002, over five years after the statute of limitations had run.

**\*\*2** [1] Allen makes two arguments that equitable tolling excuses this delay. First, he asserts that his appellate counsel failed to file an application for post-conviction relief as she had promised. Equitable tolling “is only available when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control.” *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir.2000). Because there is no constitutional right to counsel in collateral proceedings, see *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), we have held that “lack of assistance from counsel [is] not sufficient to establish extraordinary circumstances warranting equitable tolling.” *Marsh*, 223 F.3d at 1220. Moreover, the eight-year delay between the conclusion of Allen's direct appeal and the filing of the instant action belies any conclusion that Allen pursued his habeas claims diligently.

[2] Allen also argues that equitable tolling should be applied because he is actually innocent. The evidence supporting his actual innocence claim consists of letters from the victims of sexual abuse recanting their trial testimony. Equitable tolling for habeas corpus relief may be available in extraordinary circumstances such as when “a constitutional violation [will] result[ ] in the conviction of one who is actually innocent or incompetent.” *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.1998). Claims of actual innocence, however, are subject to an exacting standard, and in most cases, are simply not cognizable through habeas petitions. As the Supreme Court explained in *Herrera v. Collins*, 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993): “Claims of actual innocence based on newly discovered evidence have never been held to state a **\*551** ground for federal habeas relief absent an independent constitutional violation occurring in the

underlying state criminal proceeding.... This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.” Because Allen does not allege that these letters were not given their due weight at his state trial as a result of a constitutional violation, but rather that their appearance after the trial merely affects the balance of the evidence, he asserts a “freestanding” actual innocence claim. See, e.g., *Sellers v. Ward*, 135 F.3d 1333, 1338 (10th Cir.1998). As stated by the district court, Allen's “‘newly discovered evidence’ ... is actually the claim itself, rather than the factual predicate of a independent constitutional claim.” Such a freestanding claim of actual innocence is not available in this non-capital case.<sup>FN2</sup>

FN2. The Court in *Herrera* did not altogether preclude freestanding claims of actual innocence, and assumed for argument's sake, “that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.” *Herrera*, 506 U.S. at 417, 113 S.Ct. 853. Because Allen did not receive a death sentence, this exception does not apply. See *Milone v. Camp*, 22 F.3d 693, 700 (7th Cir.1994); but see *White v. Keane*, 51 F.Supp.2d 495, 504 (S.D.N.Y.1999) (suggesting that a liberal reading of *Herrera* extends the exception to non-capital cases). Furthermore, *Herrera* indicates that a freestanding actual innocence claim is not cognizable at all in habeas when a state avenue for relief is open, such as executive clemency. See *Herrera*, 506 U.S. at 417, 113 S.Ct. 853. The record does not indicate that Allen has sought executive clemency.

Allen's actual innocence claim has already been afforded an evidentiary hearing and appellate re-

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view by the state courts. Under *Herrera*, we are precluded from giving Allen's letters a third look. As much as these recantations give us pause, if *Herrera* is to be revisited, it is not for us to do so.

**\*\*3** Allen's request for a COA is **DENIED** and the appeal is **DISMISSED**.

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