IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40289

MARK FRANCIS HONISH,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

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

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

PER CURIAM:

(✓) The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not

having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40289

MARK FRANCIS HONISH,

Petitioner-Appellant

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LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

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

O R D E R:

Mark Francis Honish, Texas prisoner # 1745461, seeks a certificate of appealability (COA) to appeal the district court's dismissal, as time barred, of his 28 U.S.C. § 2254 petition challenging his conviction for murder. He contends that he was entitled to tolling of the limitations period during the time that his first and second state habeas applications were pending and that equitable tolling was warranted as he pursued habeas relief diligently and extraordinary circumstances were present.

Reasonable jurists would not debate the district court's determination that Honish's § 2254 petition was time barred and that he was not entitled to equitable tolling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Honish has failed to show that reasonable jurists would debate the district

court's procedural ruling, this court need not reach his substantive claims. *See id.* at 484-85. Accordingly, Honish's COA motion is DENIED. His motion for leave to proceed in forma pauperis on appeal also is DENIED.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

Certified as a true copy and issued as the mandate on Jan 05, 2018

Attest: Jyke W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK FRANCIS HONISH #01745461	§	
	§	
VS.	§	CIVIL ACTION NO. 4:16cv425
	§	
DIRECTOR, TDCJ-CID	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Kimberly C. Priest Johnson, who issued a Report and Recommendation concluding that the petition should be dismissed with prejudice as untimely filed. Petitioner filed objections.

The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such actions, has been presented for consideration. Having made a *de novo* review of the objections raised by Petitioner to the Report, the Court concludes that the findings and conclusions of the Magistrate Judge are correct. Petitioner fails to show that he timely filed his petition or that he is entitled to equitable tolling.

After the Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review, Petitioner filed his first state writ, which was dismissed as non-compliant based on excessive pages. The provisions of 28 U.S.C. § 2244(d)(2) provide that the time during which a *properly filed* application for state post-conviction or other collateral review is pending shall not be counted toward any period of limitation (emphasis added). The Supreme Court held that "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). It counseled that these rules govern

"for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Id*; *Larry v. Dretke*, 361 F.3d 890, 893 (5th Cir. 2004). The Fifth Circuit interprets the words, "properly filed," narrowly. *Lookingbill v. Cockrell*, 293 F.3d 256, 160 (5th Cir. 2002).

Petitioner claims that when he filed his first state writ, he was unaware the Texas Court of Criminal Appeals had changed its page limit. He asserts this entitles him to equitable tolling. The United States Supreme Court confirmed that the AEDPA statute of limitation is not a jurisdictional bar, and it is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010). "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." *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (quoting *Holland*, 560 U.S. at 649). The petitioner bears the burden of proving that he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

In this case, Petitioner has not shown any valid basis upon which to equitably toll the statute of limitations. The pendency of his first state writ, which was improperly filed, did not toll the limitations period. However, the second state writ, which was properly filed, tolled the limitations period for 205 days. After the denial of his second state writ, it was seventeen (17) months before the instant federal habeas petition was filed. The Fifth Circuit has held that equitable tolling is not intended for those who "sleep on their rights."*Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir.1999). Petitioner fails to show extraordinary circumstances and due diligence. He fails to meet his burden for equitable tolling. Accordingly, the Court adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court.

It is therefore **ORDERED** that the petition is **DENIED** with prejudice. Additionally, a certificate of appealability is **DENIED**.

It is finally **ORDERED** that all motions not previously ruled on are hereby **DENIED**.

SIGNED this 9th day of March, 2017.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

MARK FRANCIS HONISH #01745461	§	
	§	
VS.	§	CIVIL ACTION NO. 4:16cv425
	§	
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Mark Francis Honish, an inmate confined in the Texas prison system, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred for findings of fact, conclusions of law and recommendations for the disposition of the case.

BACKGROUND

Petitioner is challenging his Denton County conviction for first degree murder, Cause No. F-2007-2063-E. He states that on September 1, 2011, a jury found him guilty as charged, and the Second Court of Appeals affirmed his conviction on April 25, 2013. Petitioner further states that the Texas Court of Criminal Appeals refused his petition for discretionary review (PDR) on September 11, 2013, and that he did not file an 11.07 application for a writ of habeas corpus in state court until August 24, 2015, which was denied without written order on June 8, 2016.

The present petition for a writ of habeas corpus was filed on June 14, 2016. Petitioner claims he is entitled to relief based on due process violations, denial of a fair trial, Fourth amendment violations, and ineffective assistance of counsel. The Director was not ordered to file a Response.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law. A one-year statute of limitations was enacted for motions to vacate, set aside or correct a sentence pursuant to 28 U.S.C. § 2255. In general, a movant for collateral relief has one year from "the date on which the judgment became final" to file a motion challenging a conviction. A conviction is final under § 2255 when a defendant's options for further direct review are foreclosed. *United States v. Gamble*, 308 F.3d 536, 537 (5th Cir. 2000); *United States v. Thomas*, 203 F.3d 350, 352 (5th Cir. 2000). When a defendant fails to file a timely notice of appeal from the judgment of the trial court, the conviction is final upon the expiration of the time for filing a notice of appeal, which is ten days after the entry of the judgment. Fed. R. App. P. 4(b). *See, e.g., Wims v. United States*, 225 F.3d 186, 188 (2nd Cir. 2000).

In the present case, Petitioner is challenging his conviction. The appropriate limitations provision is § 2244(d)(1)(A), which states that the statute of limitations started running when the conviction became final. The Texas Court of Criminal Appeals refused his petition for discretionary review on September 11, 2013. He did not file a petition for a writ of certiorari. In interpreting § 2244(d)(1)(A) in light of Supreme Court rules, the Fifth Circuit concluded that a state conviction "becomes final upon direct review, which occurs upon denial of certiorari by the Supreme Court or expiration of the period for seeking certiorari." *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999). Under Rule 13.1 of the Supreme Court Rules, Petitioner had ninety days from the refusal of his petition for discretionary review to file a petition for a writ of certiorari. *See Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S. Ct. 948, 953, 127 L. Ed.2d 236 (1994). The Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review on September 11, 2013; thus, his conviction became final ninety days later on December 10, 2013. Accordingly, the present petition was due no

later than December 10, 2014, in the absence of tolling provisions. It was not filed until June 14, 2016 – one year, six months and four days beyond the limitations period.

The provisions of 28 U.S.C. § 2244(d)(2) provide that the time during which a properly filed application for state post-conviction or other collateral review is pending shall not be counted toward any period of limitation. Petitioner filed an application for a writ of habeas corpus on August 24, 2015, which the Court of Criminal Appeals denied without written order on June 8, 2016. However, he filed his state writ more than eight months beyond the one-year deadline. Thus, it does not serve to toll the statute of limitations. Petitioner must have filed the present petition no later than December 10, 2014. He filed it 552 days beyond the deadline. The petition is thus time-barred in the absence of any other tolling provisions.

The United States Supreme Court confirmed that the AEDPA statute of limitation is not a jurisdictional bar, and it is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645, 130 S. Ct. 2549, 2560, 177 L. Ed.2d 130 (2010). However, "[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." *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (quoting *Holland*, 560 U.S. at 648, 130 S. Ct. at 2562). "Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate." *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). The movant bears the burden of proving that he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

The Fifth Circuit has held that the district court has the power to equitably toll the limitations period in "extraordinary circumstances." *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299 (5th Cir.1998). In order to qualify for such equitable tolling, a movant must present "rare and exceptional

circumstances." *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir.1998). In making this determination, it should be noted that the Fifth Circuit has expressly held that proceeding *pro se*, illiteracy, deafness, lack of legal training, unfamiliarity with the legal process, and claims of actual innocence are insufficient reasons to equitably toll the statute of limitations. *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir.2000).

As a general rule, equitable tolling has historically been limited to situations where the movant "has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the petitioner has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed.2d 435 (1990). Furthermore, equitable tolling cannot be used to thwart the intent of Congress in enacting the limitations period. *See Davis*, 158 F.3d at 811 (noting that "rare and exceptional circumstances" are required). At the same time, the court is aware that dismissal of a first federal habeas petition is a "particularly serious matter, for that dismissal denies the movant the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas,* 517 U.S. 314, 324, 116 S. Ct. 1293, 134 L. Ed.2d 440 (1996).

In this case, Petitioner concedes that his petition is untimely but erroneously believes that the limitations "clock" did not start until after his state writ was denied. As noted above, however, for his state writ to toll the limitations deadline, Petitioner must have filed the state writ prior to the limitations deadline of December 10, 2014. He did not file his state writ until August 24, 2015. Petitioner has not shown that he diligently pursued his rights, and equitable tolling will not be granted if the petitioner fails to show that he diligently pursued his rights. *Id.* Furthermore, Petitioner has not shown that he was induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Irwin*, 498 U.S. at 96. Petitioner has not shown diligence or any "rare

and exceptional circumstances" for extending the commencement of the statute of limitations. Consequently, the motion should be dismissed as time-barred.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(B). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended that this Court, nonetheless, address whether Petitioner would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04, 146 L. Ed.2d 542 (2000). In cases where a district court rejected constitutional claims on the merits, the movant must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the underlying constitutional claim, a COA should issue when the movant shows, at least, that jurists of reason would find it debatable whether the motion 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. *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Petitioner's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37, 123 S. Ct. 1029, 1039, 154 L. Ed.2d 931 (2003) (citing *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604). Accordingly, it is respectfully recommended that the Court find that Petitioner is not entitled to a certificate of appealability.

RECOMMENDATION

It is accordingly recommended that Petitioner's petition for writ of habeas corpus under 28 U.S.C. § 2254 be denied and the case dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations contained in the report.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 19th day of July, 2016.

Don D. Bush

DON D. BUSH
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.