IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40718

MARVIN WADDLETON, III,

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

O R D E R:

Marvin Waddleton, III, Texas prisoner # 1355746, seeks a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2254 petition. In that petition, Waddleton challenged his conviction for aggravated assault of a public servant and his resulting life sentence. The district court dismissed the petition on the procedural ground that it was time barred.

In his COA motion, Waddleton reiterates his substantive claims. With respect to the timeliness of his § 2254 petition, Waddleton argues that the district court erred in sua sponte raising the issue of the timeliness of his petition and that 28 U.S.C. § 2244(d)'s one-year limitations period unconstitutionally deprives prisoners of access to the writ of habeas corpus.

He also argues that, for purposes of § 2244(d)(1)(B), the State created an impediment to the timely filing of his petition by failing to respond to his attempts to obtain his trial records and that he diligently pursued his rights and is therefore entitled to equitable tolling of § 2244(d)'s one-year limitations period. Relatedly, he challenges the district court's determination that his claim of actual innocence was insufficient to overcome the time bar in this case.

When, as here, a § 2254 petition has been dismissed on procedural grounds without addressing the merits of the prisoner's underlying constitutional claims, a COA may issue only if "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Waddleton has failed to make the required showing, both as to the determination that his § 2254 petition was untimely and as to the determination that Waddleton had made a showing of actual innocence that would excuse the time bar in this case. Accordingly, his motion for a COA is DENIED.

GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MARVIN WADDLETON	§	
v.	§	CIVIL ACTION NO. 6:15cv1002
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

The above-styled application for the writ of habeas corpus having come before the Court for consideration, and a decision having been duly rendered, it is hereby

ORDERED that the above-entitled and numbered cause of action is **DISMISSED WITH PREJUDICE**.

So **ORDERED** and **SIGNED** this **2** day of **June, 2017.**

Ron Clark

Ron Clark, United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MARVIN WADDLETON	§	
v.	§	CIVIL ACTION NO. 6:15cv1002
DIRECTOR, TDCJ-CID	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ENTERING FINAL JUDGMENT

The Petitioner Marvin Waddleton, a prisoner of the Texas Department of Criminal Justice, Correctional Institutions Division proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. This Court referred the matter to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

I. Background

Waddleton was convicted of aggravated assault of a public servant in the 114th Judicial District Court of Smith County, Texas, receiving a sentence of life in prison. He was subsequently granted an out of time appeal and his conviction was affirmed by the Twelfth Judicial District Court of Appeals on August 11, 2011. The Texas Court of Criminal Appeals refused his petition for discretionary review. *Waddleton v. State*, slip op. no. 12-10-00355-CR, 2011 WL 3505269 (Tex.App.-Tyler, August 10, 2011, *pet. ref'd* January 11, 2012). Waddleton sought and was denied certiorari review from the U.S. Supreme Court. *Waddleton v. Texas*, 133 S.Ct. 120 (October 1, 2012, *reh. den.* January 7, 2013).

On December 9, 2014, over two years and two months after his certiorari petition was denied, Waddleton filed a state habeas corpus application. This application was denied without written order by the Texas Court of Criminal Appeals on September 9, 2015. Waddleton mailed his federal habeas corpus petition on November 12, 2015.

The facts of the case, as stated in the August 2011 opinion of the Twelfth Judicial District Court of Appeals, showed Waddleton exhibited belligerent behavior against officers while confined in the Smith County Jail on November 21, 2005. When officers tried to remove him from the cell, Waddleton stabbed a guard with a toothbrush which had been sharpened to a point.

In his federal habeas petition, Waddleton asserted that: the prosecutor committed misconduct through an improper closing; the jury charge was erroneous; the indictment was improperly amended on the day of trial; there was an "open trial with an extraneous offense;" the State offered perjured testimony; the State failed to disclose material evidence favorable to the defense; Waddleton received ineffective assistance of counsel at trial and on appeal; the trial court improperly denied a motion for directed verdict; the judge was a former prosecutor who had prosecuted Waddleton in a prior offense; the judge told Waddleton not to look at a white lady juror; the judge allowed highly prejudicial evidence which had no probative value; the life sentence is disproportionate for the injuries suffered by the guard, which amounted to no more than a bruise; and, Waddleton should not have been in the jail in the first place because he was arrested by Tyler police in Winona, outside of their jurisdiction.

II. The Report of the Magistrate Judge

The Magistrate Judge ordered Waddleton to show cause why his petition should not be barred by the statute of limitations. *Day v. McDonough*, 547 U.S. 198, 210, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). In his response, Waddleton stated that on September 11, 2013, a motion for loan of the trial court records was filed in the state district court. This motion was denied but Waddleton was informed of the cost of the records for the pre-trial and guilt-innocence proceedings.

He did not hear from the clerk of court again after October 28, 2013, when the clerk stated that it was unclear what records were being requested.

Waddleton then traced his efforts to obtain copies of his transcripts, in which he wrote to the Texas Court of Criminal Appeals, the Texas State Law Library, the Twelfth Court of Appeals, and the Court Reporter Certification Board. He argued that the limitations period should be tolled or excused because of his difficulties in obtaining the transcript.

III. The Report of the Magistrate Judge

After review of the pleadings, the Magistrate Judge issued a Report recommending that the petition for habeas corpus relief be dismissed. The Magistrate Judge set out the limitations statute, 28 U.S.C. §2244(d), and stated that Waddleton's conviction became final by the denial of certiorari review on October 1, 2012, citing *Giesberg v. Cockrell*, 288 F.3d 268, 270 (5th Cir. 2002) (motion for rehearing of the denial of certiorari review by the U.S. Supreme Court does not toll the limitations period). Waddleton's limitations period began to run at that time and expired on October 1, 2013, absent the operation of other factors.[1] His state habeas corpus petition was filed in December of 2014, well after the limitations period expired, and thus cannot serve to toll any portion of the statute of limitations. *Villegas v. Johnson*, 184 F.3d 467, 472 (5th Cir. 1999).

Waddleton argues that his difficulties in obtaining his trial transcripts amounted to a state-created impediment preventing him from seeking federal habeas corpus relief. The Magistrate Judge concluded that in order to invoke this provision, found in 28 U.S.C. §2244(d)(1)(B), the petitioner must show that the state action violated the Constitution or federal law, and Waddleton failed to

[1]The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) provides for a one-year statute of limitations in habeas corpus proceedings. As set out in 28 U.S.C. §2244(d), this one-year limitations period runs from the latest of the following: (1) the date the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (2) the date on which an impediment to filing created by state action in violation of the Constitution or laws of the United States is removed; (3) the date on which the constitutional right asserted was recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

meet this requirement because the Constitution does not automatically require that a prisoner be provided with a free copy of a transcript for purposes of seeking collateral review. *Deem v. Devasto*, 140 F.App'x 574, 2005 U.S. App. LEXIS 17287, 2005 WL 1953912 (5th Cir., August 16, 2005).

The Magistrate Judge cited *Crawford v. Costello*, 27 F.App'x 57, 2001 U.S. App. LEXIS 25217, 2001 WL 1485838 (2nd Cir., November 20, 2001), in which the Second Circuit held that because there is no constitutional right to a trial transcript for collateral appeals, the state court's denial of the petitioner's request for a transcript did not amount to a constitutional impediment sufficient to toll the statute of limitations. The court also observed that the petitioner's lack of a transcript did not prevent him from filing a habeas petition.

Similarly, the Magistrate Judge stated that Waddleton has not shown his inability to obtain a transcript was an unconstitutional state-created impediment. In *Crain v. Director, TDCJ-CID*, civil action no. 6:11cv214, 2012 U.S. Dist. LEXIS 25388, 2012 WL 651730 (E.D.Tex., February 27, 2012), this Court held that problems associated with obtaining transcripts and trial records for preparing a habeas corpus petition do not amount to state-created impediments setting off the commencement date of the limitations period. Thus, the Magistrate Judge concluded that Waddleton's difficulties in obtaining his transcripts did not provide a valid basis for tolling the limitations period.

In any event, the Magistrate Judge determined that Waddleton's petition would still be time-barred even if the limitations period were tolled. His conviction became final on October 1, 2012, and his limitations period expired one year later, on October 1, 2013. Waddleton filed his motion for a loan of the trial records on September 11, 2013, with 19 days left in the limitations period. His state habeas petition was filed on December 9, 2014, and denied on September 9, 2015. The Magistrate Judge stated that if the entire period of time between September 11, 2013, and September 9, 2015 were excluded from the limitations period, Waddleton's limitations period expired on September 28, 2015, some ten weeks before he signed his federal habeas petition on December 9, 2015.

The Magistrate Judge further determined that Waddleton failed to show any basis for equitable tolling of the statute of limitations. Such equitable tolling requires a showing of rare and exceptional circumstances and necessitates a showing of reasonable diligence. *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999). The record shows Waddleton waited over eleven months after his petition for certiorari was denied in which to seek copies of his state court records to begin preparing a collateral attack, and then another year and two months elapsed before he filed his state habeas petition. The Magistrate Judge cited *Nelms v. Johnson*, 51 F.App'x 482, 2002 U.S. App. LEXIS 29070, 2002 WL 31319277 (5th Cir., September 30, 2002) (stating that "this court has found no case in which equitable tolling was granted after a petitioner had let ten months of the AEDPA limitations period slip by.") Finally, the Magistrate Judge determined that Waddleton had not set out a credible claim of actual innocence to serve as a gateway through which he may pass to avoid the statute of limitations. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928, 185 L.Ed.2d 1019 (2013).

III. Waddleton's Objections to the Report

In his objections, Waddleton alludes to the fact that he was granted an out of time appeal and denies that he slept on his rights, arguing that he proceeded with diligence. Waddleton states that before he received the denial of certiorari from the Supreme Court, he suffered an injury in an excessive use of force on October 4, 2012. He complains of being denied medical care for 21 days and having to file grievances as well as being subjected to unreasonable body cavity searches by TDCJ officials. These facts do not show that Waddleton acted with reasonable diligence in the face of the extraordinary lapses of time in this case. Waddleton's objection on this point is without merit.

Waddleton next argues the facts of his conviction, asserting that the State failed to prove he had stabbed anyone because the officer's injury was actually caused by the steel door and the toothbrush was not a deadly weapon *per se*. He also complained that he was unlawfully in the Smith County Jail because he was arrested by Tyler police outside of their jurisdiction. These allegations do not set out a credible showing of actual innocence sufficient to avoid the statute of limitations. *See McQuiggin*, 133 S.Ct. at 1928 (to show actual innocence, a petitioner must demonstrate that in

the light of newly discovered evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt); *House v. Bell*, 547 U.S. 518, 538, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), (examples of such "new reliable evidence" include exculpatory scientific evidence, credible declarations of guilt by another, trustworthy eyewitness accounts, or critical physical evidence which was not presented at trial). Waddleton's objection on this point is without merit.

With regard to equitable tolling, Waddleton argued that the statute of limitations is not jurisdictional and thus is subject to "a rebuttable presumption in favor of equitable tolling." In holding that the statute of limitations is subject to equitable tolling, the Supreme Court explained that the AEDPA is non-jurisdictional and that a non-jurisdictional federal statute of limitations is normally subject to a rebuttable presumption in favor of equitable tolling. *Holland v. Florida*, 560 U.S. 631, 646, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010). This holding does not refer to whether a particular petitioner has a rebuttable presumption of equitable tolling, but to the determination of whether or not the principle of equitable tolling applies at all to a statutory limitations period where the statute made no provision for such tolling.[2] An individual petitioner is entitled to equitable tolling only if he shows that he has been pursuing his rights diligently but some extraordinary circumstance stood in his way and prevented timely filing. *Id.* at 649. The Magistrate Judge correctly determined that Waddleton failed to meet this standard. His objection on this point is without merit.

Next, Waddleton argues that the intent of Congress was to limit only death penalty cases to the one-year statute of limitations. This is plainly incorrect. The statute provides that "a one-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." There is no statutory language stating that the limitations period applies only to capital cases; 28 U.S.C. §§2261 through §2266 concern special habeas corpus

[1]In other words, the question before the Supreme Court was whether or not the statutory limitations period in the AEDPA could be tolled for equitable reasons. In deciding this question, one consideration was the rebuttable presumption in favor of equitable tolling which applies to non-jurisdictional federal limitations statutes.

procedures in capital cases, and had Congress intended that the limitations period apply only to capital cases, the statute would likely have been placed in this section. Waddleton's objection on this point is without merit.

Waddleton again complains of an assault upon him in October of 2012 and his subsequentl placement in lockup. He also states that he lost $250.00 worth of property, the facility where he was confined went on lockdown in February of 2013, and his elderly mother who lives alone suffers from heart problems and dementia and had to get a pacemaker. This meant Waddleton had to write to people to check on her when he did not get any letters or phone calls. None of these assertions demonstrate rare and exceptional circumstances justifying equitable tolling, nor do they excuse the lapses of time which caused the limitations period to expire. Waddleton's objection on this point is without merit.

Waddleton next contends that the AEDPA has caused an impediment and vexation to the constitutional right to the writ of habeas corpus and is thus unconstitutional. He also complains that the statute violates due process and equal protection by stating that the defendant's conviction becomes final at the conclusion of direct review, which does not set any limitations for the State or defense counsel to file for direct review, but yet sets unreasonable limits for the defendant to acquire trial records, seek an attorney, or seek discovery and investigation pertaining to his claim.

The constitutionality of the AEDPA has been repeatedly upheld. *Felker v. Turpin*, 518 U.S. 661, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996); *Turner v. Johnson*, 177 F.3d 390, 392-93 (5th Cir.), *cert. denied*, 528 U.S. 1007 (1999). The record shows that Waddleton was granted an out-of-time appeal, and his conviction did not become final until October of 2012, some six and a half years after his trial in March of 2006. Waddleton fails to show how the fact that his conviction became final at the conclusion of direct review amounts to a violation of due process or equal protection.

As the Magistrate Judge correctly determined, Waddleton did not file his motion seeking the trial transcripts until over 11 months had elapsed from the date his conviction became final. If the whole time period from the filing of this motion until Waddleton's state habeas corpus application

was denied is tolled, Waddleton still filed his federal habeas petition outside of the statute of limitations by some ten weeks. The lapses of time do not bespeak reasonable diligence. *See Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013). The Magistrate Judge properly recommended that Waddleton's petition be dismissed as barred by limitations, and Waddleton has not met his burden of showing entitlement to equitable tolling. His objections are without merit.

V. Conclusion

The Court has conducted a careful *de novo* review of those portions of the Magistrate Judge's proposed findings and recommendations to which the Plaintiff objected. *See* 28 U.S.C. §636(b)(1) (District Judge shall "make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which objection is made.") Upon such *de novo* review, the Court has determined that the Report of the Magistrate Judge is correct and the Plaintiff's objections are without merit. It is accordingly

ORDERED that the Petitioner's objections are overruled and the Report of the Magistrate Judge (docket no. 11) is **ADOPTED** as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus is **DISMISSED WITH PREJUDICE**. It is further

ORDERED that the Petitioner Marvin Waddleton is **DENIED** a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby **DENIED.**

So **ORDERED** and **SIGNED** this **2** day of **June, 2017.**

Ron Clark

Ron Clark, United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

MARVIN WADDLETON III	§	
v.	§	CIVIL ACTION NO. 6:15cv1002
DIRECTOR, TDCJ-CID	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Petitioner Marvin Waddleton III, proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality of his conviction. The petition has been referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

I. Background

Waddleton was convicted of aggravated assault on a public servant in the 241st Judicial District Court of Smith County, Texas on March 16, 2006, receiving a sentence of life in prison. He was subsequently granted an out of time appeal by the Texas Court of Criminal Appeals. *See* Ex Parte Waddleton, 2010 WL 3784105 (Tex.Crim.App., September 29, 2010) (granting out of time appeal). His conviction was affirmed on appeal by the Twelfth Judicial Court of Appeals, and discretionary review was refused by the Texas Court of Criminal Appeals. Waddleton v. State, slip op. no. 12-10-00355-CR, 2011 WL 3505269 (Tex.App.-Tyler, August 10, 2011, *pet. ref'd* January 11, 2012). Waddleton sought and was denied certiorari review from the U.S. Supreme Court. Waddleton v. Texas, 133 S.Ct. 120 (October 1, 2012, *reh. den.* January 7, 2013).

Waddleton then filed a state habeas corpus petition on December 9, 2014. This was denied without written order on September 9, 2015. He mailed his federal habeas petition on November 12, 2015.

The facts of the case, as stated in the August 2011 opinion by the Twelfth Judicial District Court of Appeals, showed that correctional officers were called to Waddleton's cell in the Smith County Jail on November 21, 2005, on a report of an assaultive inmate. The officers decided to remove Waddleton from his cell, but he was belligerent. Waddleton held a mattress above his head as the officers entered his cell. One of the officers kicked the mattress and tackled Waddleton, who began stabbing the officer with a toothbrush which had been sharpened to a point. The officer suffered minor wounds.

In his petition, Waddleton contends that: the prosecutor committed misconduct through an improper closing, the jury charge was erroneous, the indictment was improperly amended on the day of trial, there was an "open trial with an extraneous offense," the State offered perjured testimony, failure to disclose material evidence favorable to the defense, he received ineffective assistance of counsel at trial and on appeal, the trial court improperly denied a motion for directed verdict, the judge was a former prosecutor who had prosecuted Waddleton in a prior offense, the judge told Waddleton not to look at a white lady juror, the judge allowed highly prejudicial evidence which had no probative value, the life sentence is disproportionate for a bruise, and Waddleton should not have been in the jail in the first place because he was arrested by Tyler police in Winona, outside of their jurisdiction.

II. Proceedings Concerning Limitations

After review of the pleadings, the Court ordered Waddleton to show cause why his petition should not be barred by the statute of limitations. Day v. McDonough, 547 U.S. 198, 210, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006); Galindo v. Quarterman, 331 F.App'x 291, 2009 U.S. App. LEXIS 17564, 2009 WL 2407226 (5th Cir., August 6, 2009). Waddleton filed a response in the form of a motion for leave to supplement his petition.

In this motion, Waddleton states that on September 11, 2013, a motion for loan of the trial court records was filed in the district court. This motion was denied, but Waddleton was informed of the cost of the records for the pre-trial and guilt-innocence records. The last time he heard from the district clerk was on October 28, 2013, when the clerk stated it was unclear what transcripts were being requested. Waddleton states he again asked for a copy of the pre-trial and guilt-innocence records, but he never heard from the clerk of court again. After that, Waddleton states as follows:

> After not hearing from the 241st District Court had written to the Court of Criminal Appeals which did [sic] have the records before the court. Then wrote to the Texas State Law Library on or about the 11th of January 2014, which received a letter that the State Law Library is unable to access records from Court of Appeals outside of Austin, which recommended to contact the 12th Court of Appeals. It was not until June 7th 2015 before getting a partial trial record which lack the pretrial jury voir dire. In response to letter to the Court of Appeals for the 12th District that what I'd previously purchased is the only record containing the pre-trial and trial, on file in this Court. Then a letter was sent to the Court Reporters Certification Board in regards to the incomplete trial records which stated that needed [sic] to contact the court reporter which never responded. The letter was dated August 25, '14.

Waddleton argues that the trial records were necessary to present his claims for review in his state habeas corpus proceeding. He contends that had the state told the jury the correct elements of aggravated assault and what the injury needed to be, the jury would not have found him guilty of the charge. If the district clerk had provided the information needed to purchase the trial records other than merely stating these records cost $1.00 per page, his habeas corpus proceeding would have been filed in a timely manner. Furthermore, Waddleton asserts that "with all lower court the filing of a timely rehearing tolls the time, so the petitioner had the rehearing denial of January 27, 2013, which does not apply with the U.S. Supreme Court [sic]."

Once he purchased the trial records, Waddleton states that he was able to show that the jury charge was incorrect and that trial counsel failed to object. He adds that "with the defect[ive] indictment and incorrect jury charge the Appellant should have challenged the sufficient [sic] of the element a Malik challenge that require[s] the reviewing court to review the sufficient [sic] based on the elements of the offense set out in the penal code." Without a copy of the trial records, Waddleton argues that his state habeas proceeding would have been without merit.

III. Legal Standards and Analysis

The Fifth Circuit has held that district courts can raise the issue of limitations *sua sponte*. Kiser v. Johnson, 163 F.3d 326, 328 (5th Cir. 1999). Waddleton was given the opportunity to respond to the limitations issue and explain why his petition should not be barred, as provided in Day.

The statute of limitations, set out in 28 U.S.C. §2244(d), reads as follows:

> **(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 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.

Waddleton's conviction became final by the denial of certiorari review on October 1, 2012. Giesberg v. Cockrell, 288 F.3d 268, 270 (5th Cir. 2002) (motion for rehearing of the denial of certiorari review by the U.S. Supreme Court does not toll the limitations period). His limitations period began to run at that time and expired on October 1, 2013, absent the operation of other factors.

Waddleton maintains that the limitations period should be excused because he was unable to obtain a copy of the trial transcript. The Fifth Circuit has stated that in order to invoke §2244(d)(1)(B), the petitioner must show that he was prevented from filing a petition by state action in violation of the Constitution or federal law. Egerton v. Cockrell, 334 F.3d 433, 436 (5th Cir.

2003); Wickware v. Thaler, 404 F.App'x 856, 2010 U.S. App. LEXIS 25465, 2010 WL 5062314 (5th Cir. 2010). The Constitution does not automatically require that a prisoner be provided on request with a free copy of a transcript for purposes of seeking collateral review. Deem v. Devasto, 140 F.App'x 574, 2005 U.S. App. LEXIS 17287, 2005 WL 1953912 (5th Cir., August 16, 2005). In Crawford v. Costello, 27 F.App'x 57, 2001 U.S. App. LEXIS 25217, 2001 WL 1485838 (2nd Cir., November 20, 2001) the Second Circuit explained as follows:

> Because there is no constitutional right to a trial transcript for collateral appeals, the state's denial of his request for a transcript did not constitute a constitutional impediment sufficient to toll the statute of limitations. *See, e.g.*, United States v. MacCollum, 426 U.S. 317, 323-24, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976); Crossley v. United States, 538 F.2d 508, 509 (2nd Cir. 1976). Nor did Crawford's lack of transcript prevent him from filing a habeas petition. *See, e.g.*, Jihad v. Hvass, 267 F.3d 803, 806 (8th Cir. 2001) ("[L]ack of access to a trial transcript does not preclude a prisoner from commencing post-conviction proceedings and therefore does not warrant equitable tolling.")

Waddleton has not shown that his inability to obtain a transcript was an unconstitutional state-created impediment to his seeking state habeas corpus relief. In Crain v. Director, TDCJ-CID, civil action no. 6:11cv214, 2012 U.S. Dist. LEXIS 25388, 2012 WL 651730 (E.D.Tex., February 27, 2012), this Court stated that

> [t]he courts have held that problems associated with obtaining transcripts and trial records for preparing a habeas corpus petition do not amount to "state-created impediments," setting off the commencement date of the limitations period. Lloyd v. Vannatta, 296 F.3d 630, 632–33 (7th Cir.2002); Randolph v. Taylor, 69 F.App'x 824, 2003 WL 21421712 (9th Cir., June 13, 2003); Miller v. Cason, 49 F.App'x 495, 2002 WL 31164208 (6th Cir., September 27, 2002); Crawford v. Costello, 27 F.App'x 57, 2001 WL 1485838 (2nd Cir., November 20, 2001); Cole v. Director, TDCJ, civil action no. 6:09cv128, 2009 WL 1468470 (E.D.Tex., May 26, 2009) (no appeal taken).

Thus, the fact that Waddleton experienced difficulty in obtaining his trial transcripts does not provide a valid basis for tolling the statute of limitations. Nonetheless, Waddleton's petition would still be time-barred even if the limitations period were tolled.

Waddleton's conviction became final on October 1, 2012, and his limitations period expired on October 1, 2013. He filed his motion for a loan of the trial court records on September 11, 2013, with 19 days left in the limitations period. Waddleton's state habeas petition was filed on December

9, 2014, and denied on September 9, 2015. If the entire time between the filing of Waddleton's motion for a loan of his trial records and the denial of his state habeas petition were tolled and thus excluded from the calculation, Waddleton's limitations period would expire on September 28, 2015, almost ten weeks before he signed his federal habeas petition on December 9, 2015.

Nor has Waddleton has not shown any basis upon which the limitations period should be equitably tolled. 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, the petition 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, and unfamiliarity with the legal process are insufficient reasons to equitably toll the statute of limitations. Felder v. Johnson, 204 F.3d 168, 173 (5th Cir. 2000); *see also* Fisher, 174 F.3d at 713 n.11.

The Supreme Court has held that equitable tolling applies in federal habeas corpus challenges to state convictions, but that a petitioner may be entitled to such tolling only if he shows that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way and prevented timely filing. Holland v. Florida, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010).

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 petitioner 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).

Waddleton has failed to show any rare and exceptional circumstances justifying the tolling of the statute of limitations. The Fifth Circuit has explained that equitable tolling is not intended

for those who "sleep on their rights." Coleman v. Johnson, 184 F.3d 398, 403 (5th Cir. 1999). This comports with the Supreme Court's holding that "reasonable diligence" is required for entitlement to equitable tolling. Holland, 560 U.S. at 653. Waddleton's pleadings show that eleven months lapsed between the date his petition for certiorari was denied and the date he sought copies of his state court records in order to begin preparing a collateral attack. Another year and two months elapsed before he filed his state habeas petition. This lapse of time plainly does not bespeak reasonable diligence. *See* Nelms v. Johnson, 51 F.App'x 482, 2002 U.S. App. LEXIS 29070, 2002 WL 31319277 (5th Cir., September 30, 2002) (stating that "this court has found no case in which equitable tolling was granted after a petitioner had let ten months of the AEDPA limitations period slip by.") Waddleton has slept on his rights and failed to exercise reasonable diligence, and as a result is not entitled to equitable tolling of the limitations period.

Nor has Waddleton set out a credible claim of actual innocence. The Supreme Court has held that actual innocence serves as a gateway through which a petitioner may pass to avoid a procedural impediment such as the statute of limitations. McQuiggin v. Perkins, 133 S.Ct. 1924, 1928, 185 L.Ed.2d 1019 (2013); *see also* Tamayo v. Stephens, 740 F.3d 986, 990 (5th Cir. 2014) (properly supported claim of actual innocence can excuse the failure to comply with the statute of limitations).

However, a petitioner does not meet the threshold requirement of actual innocence unless he shows that in light of newly discovered evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. McQuiggin, 133 S.Ct. at 1928, *citing* Schlup v. Delo, 513 U.S. 298, 329, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). In House v. Bell, 547 U.S. 518, 538, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006), the Supreme Court stated that examples of such "new reliable evidence" include exculpatory scientific evidence, credible declarations of guilt by another, trustworthy eyewitness accounts, or critical physical evidence which was not presented at trial. *Accord*, Fairman v. Anderson, 188 F.3d 635, 645 (5th Cir.1999).

Waddleton points to no new evidence in light of which no reasonable juror would have voted to convict him. He argues that the jury would not have convicted him because they were improperly apprised of the law; Waddleton contends that the offense of aggravated assault carries an element of serious bodily injury, but neither the indictment nor the jury charge contained this element. In fact, the offense of aggravated assault requires that the person commit assault and *either* causes serious bodily injury *or* uses or exhibits a deadly weapon. Tex. Penal Code art. 22.02(a). The jury found that he used a deadly weapon and this finding was affirmed on appeal. Waddleton, 2011 WL 3505269 at *2.

The Supreme Court has made clear that the term "actual innocence" means factual innocence and not mere legal insufficiency. *See* Bousley v. United States, 523 U.S. 614, 623-24, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). More specifically, actual innocence means that the person did not commit the crime, while legal innocence arises when a constitutional violation by itself would require reversal. Morris v. Dretke, 90 F.App'x 62, 2004 U.S. App. LEXIS 183, 2004 WL 49095 (5th Cir., January 6, 2004). Waddleton has offered nothing to suggest that he is actually innocent. He has failed to point to any basis upon which the limitations period may be tolled or avoided and his petition is barred by the statute of limitations.

Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. §2253(c)(1)(A). A district court may deny a certificate of appealability *sua sponte* because the district court that denies a 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 that court. *See* Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000).

A certificate of appealability may only be granted where the petitioners makes a substantial showing of the denial of a federal right. Newby v. Johnson, 81 F.3d 567, 569 (5th Cir. 1996). This is done through a demonstration that the issues are debatable among jurists of reason, that a court

could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. James v. Cain, 50 F.3d 1327, 1330 (5th Cir. 1995).

The Supreme Court has stated that when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate of appealability should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the prisoner 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. Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

In this case, reasonable jurists would not find it debatable whether the district court was correct in its procedural ruling that Waddleton's petition is barred by the statute of limitations. Waddleton is not entitled to a certificate of appealability.

RECOMMENDATION

It is accordingly recommended that the above-styled application for the writ of habeas corpus be dismissed with prejudice as barred by the statute of limitations. 28 U.S.C. §2244(d). It is further recommended that a certificate of appealability be denied *sua sponte*.

A party's failure to file objections to the findings, conclusions, and recommendations contained in this Report within 14 days after service with a copy thereof shall bar that party from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So ORDERED and SIGNED this 22nd day of March, 2017.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE