NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

STEVIE ANDRE' ROBERSON - PETITIONER

VS.

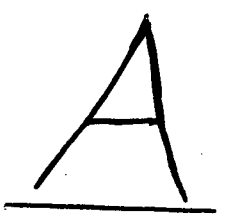
LORIE DAVIS; T.D.C.J.-C.I.D. - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO:

UNITED STATES COURT OF APPEALS FOR THE 5TH CIRCUIT

# APPENDIX A-1

UNITED STATES 5TH CIRCUIT COURT OF APPEALS DECISION
NO. 17-40681



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# IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-40681



STEVIE ANDRE ROBERSON,

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:

Stevie Andre Roberson, Texas prisoner # 1877155, moves for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 application raising claims that (1) he was wrongfully convicted based upon a void indictment, (2) his conviction violated his ex post facto rights, (3) his conviction violated his double jeopardy rights, (4) his conviction and sentence constituted cruel and unusual punishment, and (5) he received ineffective assistance of trial counsel. Roberson argues that the district court erred by dismissing his § 2254 application as time barred.

A COA may issue only if the applicant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court has denied a request

for habeas relief on procedural grounds, the prisoner must show "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*, 529 U.S. at 484. Roberson fails to make the necessary showing. Accordingly, his motions for a COA and for leave to proceed in forma pauperis are DENIED. Roberson's motion for leave to file a supplemental brief is GRANTED.

STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

NO. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

STEVIE ANDRE' ROBERSON - PETITIONER

VS.

LORIE DAVIS; T.D.C.J.- C.I.O. - RESPONDENT (S)

ON PETITION FOR A WRIT OF CERTIORARI TO:

UNITED STATE COURT OF APPEALS FOR THE 5TH CIRCUIT

# APPENDIX B

UNITED STATES EASTERN DISTRICT OF TEXAS (TYLER) COURT'S DECISION
No. 6:16 CV 104

B

PAGES 1-10

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

| | | |
|---|---|---|
| STEVIE ANDRE ROBERSON | § | |
| v. | § | CIVIL ACTION NO. 6:16cv104 |
| DIRECTOR, TDCJ-CID | § | |

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

The Petitioner Stevie Andre Roberson, 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 ordered that the matter be referred 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**

Roberson was convicted of failure to register as a sex offender on August 1, 2013, receiving a sentence of 25 years in prison. He did not take a direct appeal, but filed a state habeas application on November 6, 2014. This application was denied without written order on June 24, 2015. Roberson signed his federal habeas corpus petition on February 23, 2016.

In his federal habeas petition, Roberson asserts that: (1) his conviction is unlawful because his rape conviction was discharged in 1986, several years before the registration statute was enacted; (2) requiring him to register as a sex offender violates the Ex Post Facto Clause; (3) requiring him to register as a sex offender and punishing him when he did not violates double jeopardy; (4)

requiring him to register as a sex offender and punishing him when he did not amounts to cruel and unusual punishment; and (5) he received ineffective assistance of counsel.

The Magistrate Judge determined that Roberson's petition may be barred by the statute of limitations and gave him an additional opportunity to explain why his petition should not be so barred. *See Day v. McDonough*, 547 U.S. 198, 210, 126 S.Ct. 1675, 1684, 164 L.Ed.2d 376 (2006).[1] In response, Roberson argued that: (1) his conviction became final at the expiration of his time to seek certiorari from the U.S. Supreme Court, 90 days after he was convicted, making his petition timely; (2) he properly filed his state habeas petition, which is the proper means to seek an out of time appeal; (3) the state district court did not apply a limitations bar to his state habeas application and the Texas Court of Criminal Appeals denied his petition without written order, allowing the federal court to review his claims because the state court did not apply a procedural bar; (4) he is challenging a defect in his indictment and because indictments are jurisdictional, he can raise this issue at any time; and (5) an actual innocence or wrongful conviction habeas petition is not barred by limitations and his petition is "properly filed" under *Villegas v. Johnson*, 184 F.3d 467, 472 (5th Cir. 1999).

**II. The Report of the Magistrate Judge**

After review of the pleadings, the Magistrate Judge issued a Report recommending that the petition be dismissed as barred by limitations. The Magistrate Judge determined that Roberson's conviction became final when his time to appeal expired, which was on September 3, 2013. Although Roberson argued that he should have 90 days from the date of his conviction in which 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.

seek certiorari, he cannot seek certiorari from the decision of a state trial court. The Fifth Circuit held that if a petitioner took a direct appeal of his conviction to the state court of last resort, the conviction becomes final on the conclusion of direct review or the expiration of the time for seeking such review, including the 90 days allowed for seeking certiorari from the Supreme Court. However, if the petitioner stopped his direct appeal before going to the state court of last resort, then the conviction becomes final when the time for seeking further direct review in state court expires. *Roberts v. Cockrell*, 319 F.3d 690, 693-94 (5th Cir. 2003).

Thus, if a habeas petitioner is convicted in the state trial court, files a direct appeal to the intermediate appellate court, and seeks discretionary review from the Texas Court of Criminal Appeals, his conviction becomes final when the U.S. Supreme Court denies certiorari or the time for seeking certiorari review from the Court of Criminal Appeals has expired. If the petitioner is convicted and does not take a direct appeal to the intermediate appeals court or does not seek discretionary review, his conviction becomes final when the time for taking the next step expires, and the petitioner cannot add the 90 days for seeking certiorari review. *See also Butler v. Cain*, 533 F.3d 314, 317 (5th Cir. 2008).

The Magistrate Judge stated that because Roberson, like the petitioner in *Butler*, did not take a direct appeal to the state court of last resort, his conviction became final at the expiration of his time to appeal, on September 3, 2013, and his limitations period expired on September 3, 2014. The Magistrate Judge further observed that Roberson does not point to any state-created impediments preventing him from seeking habeas corpus relief in a timely manner, nor does he show that he is asserting a right newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. Roberson also does not contend that he could not have discovered the factual bases of his claim in a timely manner.

Although Roberson did file a state habeas application, this application was filed on November 6, 2014, some two months after the limitations period expired. The Magistrate Judge

therefore stated that this application did not extend any portion of the limitations period. *Villegas*, 184 F.3d at 472.

Next, the Magistrate Judge determined that Roberson had not shown any basis for equitable tolling of the limitations period. Roberson offered no viable reason for the 14-month lapse in time between his conviction becoming final in September of 2013 and the filing of his state habeas application in November of 2014.

The Magistrate Judge also stated that Roberson failed to set out a credible showing of actual innocence. Such a showing requires the petitioner to demonstrate that in the light of newly discovered evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928, 185 L.Ed.2d 1019 (2013); *Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir. 2014).

In this case, the Magistrate Judge stated that Roberson argues that the retroactive application of the sex offender registration law to him violates the *Ex Post Facto* Clause, but the Supreme Court has held that such registration laws are non-punitive and thus do not violate the Clause. *Smith v. Doe*, 538 U.S. 84, 95-96, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003); *see also King v. McCraw*, 559 F.App'x 278, 2014 U.S. App. LEXIS 4400 (5th Cir. ); *Hayes v. Texas*, 370 F.App'x 508, 2010 U.S. App. LEXIS 5643, 2010 WL 1141631 (5th Cir., March 18, 2010).

Likewise, the Magistrate Judge stated that the Texas sex offender registration law does not violate double jeopardy because it does not inflict multiple punishments for the same offense. Because the law is non-punitive, it does not inflict cruel or unusual punishment. The Magistrate Judge determined that Roberson did not show any defect in the indictment sufficient to deprive the trial court of jurisdiction and the State of Texas does not have a limitations period for bringing habeas applications, so there was no procedural bar for the state courts to apply. While Roberson's state habeas application was "properly filed," it was filed outside of the limitations period and thus did not serve to toll any portion of that period. The Magistrate Judge therefore determined that

Roberson had not pointed to any basis upon which the limitations period could be tolled or avoided and concluded that the petition was barred by the statute of limitations.

**III. Roberson's Objections**

In his first set of objections, Roberson states that his claims are jurisdictional and no valid plea, waiver, jury verdict, or sentence exists as a matter of law. He cites *United States v. Peter*, 310 F.3d 709, 715 (11th Cir. 2002), in which the Eleventh Circuit held that a court is without jurisdiction to accept a guilty plea to a non-offense and when a court without jurisdiction convicts and sentences a defendant, the conviction and sentence are void from their inception and remain void long after a defendant has fully suffered their direct force.

However, the Supreme Court has held that defects in an indictment do not deprive a district court of power to adjudicate a case. *United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Although *Peter* sought to distinguish *Cotton*, the Fifth Circuit has stated that "we join the Tenth Circuit in holding that *Peter* was wrongly decided and cannot be squared with *Cotton*." *United States v. Scruggs*, 714 F.3d 258, 264 (5th Cir. 2013). Because Fifth Circuit precedent rejects *Peter*, that case affords Roberson no basis for relief.

This Court and others have held that a habeas petitioner cannot evade the statute of limitations by the simple expedient of arguing that his conviction or sentence is void. *Wilwant v. Stephens*, civil action no. 4:13cv276, 2013 U.S. Dist. LEXIS 89623, 2013 WL 3227656 (N.D.Tex., June 25, 2013); *Randall v. Director, TDCJ-CID*, civil action no. 2:07cv204, 2008 U.S. Dist. LEXIS 39835, 2008 WL 2128231 (E.D.Tex., May 16, 2008), *citing Nortensen v. Reid*, 133 F.App'x 509, 2005 U.S. App. LEXIS 9860, 2005 WL 1253964 (10th Cir., May 27, 2005).

In any event, Roberson offers nothing to suggest that his conviction is void. He argues that the sex offender registration law is unconstitutional because it applies to convictions such as his which took place before the registration law was enacted. As the Magistrate Judge correctly determined, sex offender registration laws are non-punitive and therefore do not violate the *Ex Post Facto* Clause. *See Smith*, 538 U.S. at 91 (noting that "although convicted before the passage of the

Act, respondents are covered by it"); *King*, 559 F.App'x at 281 (stating that the Fifth Circuit has "repeatedly affirmed a district court's dismissal as frivolous the claim that the retroactive application of Texas law requiring sex offender registration and notification violates the *Ex Post Facto* Clause."

Roberson next asserts that the sex offender registration law only applies to persons convicted of a sex offense after September 1, 1970. He argues that this provision violates equal protection because it discriminates against persons like himself who were convicted after that date. This contention is raised for the first time in Roberson's objections to the Magistrate Judge's Report. The Fifth Circuit has stated that claims raised for the first time in objections to the Magistrate Judge's Report are not properly before the district court. *Finley v. Johnson*, 243 F.3d 215, 218 n.3 (5th Cir. 2001).

Even were these claims properly before the Court, they are without merit. The 1997 amendments to the Sex Offender Registration Statute, Tex. Crim. Pro. Art. 62.002, expanded the class of persons required to register to apply to those individuals who had a reportable conviction or adjudication occurred on or after September 1, 1970. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 668 §§1, 11, 1997 Tex. Gen. Laws 2260-61, 2264. The fact that persons with convictions over 27 years old were not required to register does not render the statute unconstitutional even were this claim properly before the Court. *See Stauffer v. Gearhart*, 741 F.3d 574, 587 (5th Cir. 2014) (sex offenders are not a suspect classification); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988) (where a suspect classification is not involved, a statute will survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose).

Statutes subject to rational-basis review are accorded a strong presumption of validity and the burden is on the one attacking the statute to negate every conceivable basis which might support it, whether or not the basis has a foundation in the record. *Heller v. Doe*, 509 U.S. 312, 320-21, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Roberson has failed to overcome the presumption of validity attached to the Texas sex offender registration statute. Furthermore, he has not shown why an equal

protection challenge to his conviction is not barred by the statute of limitations. His objection on this point not properly before the Court and is without merit in any event.

Roberson argues that he is actually innocent because the statute is unconstitutional. No case has held that the Texas sex offender registration statute is unconstitutional, and Roberson makes no showing to this effect. *See Allen v. Dretke*, civil action no. 3:03cv2123, 2004 U.S. Dist. LEXIS 5308, 2004 WL 691233 (N.D.Tex., March 30, 2004) (observing that in *Connecticut Department of Public Safety v. Doe,* 538 U.S. 1, 7-8, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003), the Supreme Court held that Connecticut's sex offender law, which was "remarkably similar" to the law in Texas, was not unconstitutional).

As the Magistrate Judge correctly concluded, a viable claim of actual innocence so as to evade the statute of limitations requires a showing that in the light of newly discovered evidence, no reasonable juror would have voted to find him guilty beyond a reasonable doubt. *McQuiggin*, 133 S.Ct. at 1928. The actual innocence exception applies only where the petitioner shows, as a factual matter, that he did not commit the crime of conviction. *Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999). The Supreme Court has held that to be credible, a claim of actual innocence requires the petitioner to support his allegations of constitutional error with new reliable evidence, whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence which was not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 329, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

Roberson has offered nothing to show that as a factual matter, he did not commit the offense which he is challenging in this petition. His objection regarding the actual innocence exception to the statute of limitations is without merit.

Roberson's contention that the Texas sex offender statute exceeds Congress' enumerated powers fails because the statute was not enacted by Congress. His assertions that the statute violates the Due Process Clause and the *Ex Post Facto* Clause have been rejected by the Fifth Circuit. *King*, 559 F.App'x at 281. Roberson's first set of objections are without merit.

In his second set of objections, Roberson argues that because the State of Texas lacked jurisdiction, there is no time bar as a matter of law. This is little more than a re-statement of his contention that the statute of limitations does not apply because the conviction is void. *See Willis v. Dretke*, civil action no. 3:03cv1284, 2005 U.S. Dist. LEXIS 210, 2005 WL 39053 (N.D.Tex., January 6, 2005) (petitioner is not entitled to equitable tolling of the statute of limitations based on an argument that the trial court lacked jurisdiction); *Henson v. Thaler*, civil action no. 4:12cv759, 2013 U.S. Dist. LEXIS 45534, 2013 WL 1286214 (N.D.Tex., March 8, 2013) (rejecting argument that limitations did not apply to the petitioner's case because his conviction was allegedly rendered void by a variance between the original complaint and the indictment). This objection is without merit.

After repeating his equal protection challenge, Roberson concedes that the Supreme Court has found sex offender registration statutes to be non-punitive. However, he contends that the provisions of the statute under which he was convicted, including failure to comply with change of address provisions, failure to comply with a visitation provision, and failure to comply with a change of status provision, resemble the punishment of imprisonment tantamount to an affirmative restraint. He also contends that requiring periodic in-person office visits to update his registry file and to be physically present during unannounced resident checks is a punitive measure forbidden by the *Ex Post Facto* Clause

In support of these arguments, Roberson cites to the appellate court decision which was reversed by the Supreme Court in *Smith*. While it may be true, as Roberson contends, that the Ninth Circuit held that the requirement of periodic updates imposed an affirmative disability and that the registration obligations were retributive, the reversal of the Ninth Circuit's decision by the Supreme Court wiped these holdings away and rendered them of no legal effect. Roberson's objections in this regard are without merit.

Roberson next argues that placing "affirmative disabilities" on him for a crime he discharged in 1986 amounts to double jeopardy as well as cruel and unusual punishment. These contentions lack merit because the Texas sex offender registration statute is a civil rather than a criminal statute and is not punitive in nature. *Creekmore v. Attorney General of Texas*, 341 F.Supp.2d 648, 659-60 (E.D.Tex. 2004) (rejecting claims that the Texas sex offender registration law is an *ex post facto* law, a bill of attainder, cruel and unusual punishment, and double jeopardy because the law is civil and non-punitive). These objections are without merit.

Nor has Roberson set out any basis for equitable tolling of the statute of limitations. The statute of limitations may be equitably tolled in extraordinary circumstances. *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1988). The habeas petitioner has the burden of establishing that equitable tolling is warranted. *Howland v. Quarterman*, 507 F.3d 840, 845 (5th Cir. 2007). To accomplish this, the petitioner must show that he has been pursuing his rights diligently but some extraordinary circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649, 130 S.Ct. 2549, 2562, 177 L.Ed.2d 130 (2010). Such circumstances as ignorance of the law, lack of knowledge of filing deadlines, a prisoner's *pro se* status, incarceration prior to the passage of the AEDPA, illiteracy, deafness, and lack of legal training have been held insufficient to justify equitable tolling of the limitations period. *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000).

In this case, over one year and two months elapsed between the time Roberson's conviction became final and the filing of his state habeas corpus application. Such a lapse of time plainly does not bespeak reasonable diligence. *See Palacios v. Stephens*, 723 F.3d 600, 604 (5th Cir. 2013); *accord, Nelms v. Johnson*, 51 F.App'x 482, 2002 U.S. App. LEXIS 21827, 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.") Roberson 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. 12) 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 Stevie Andre Roberson 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 **13** day of **June, 2017.**

Ron Clark

Ron Clark, United States District Judge

NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

STEVIE ANDRE' ROBERSON - PETITIONER

VS.

LORIE DAVIS; T.D.C.J.-C.I.D - RESPONDENT(S)

ON PETITION FOR WRIT OF CERTORARI TO:

UNITED STATES COURT OF APPEALS FOR THE 5TH CIRCUIT

# APPENDIX C

UNITED STATES MAGISTRATE'S REPORT AND RECOMMENDATION
No. 6:16 CV 104

C

PAGES 1-9

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

| | | |
|---|---|---|
| STEVIE ANDRE ROBERSON | § | |
| v. | § | CIVIL ACTION NO. 6:16cv104 |
| DIRECTOR, TDCJ-CID | § | |

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Petitioner Stevie Roberson, 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**

Roberson was convicted of failure to register as a sex offender in the 114th Judicial District Court of Smith County, Texas on August 1, 2013, receiving a sentence of 25 years in prison. He states that he did not take a direct appeal but filed a state application for the writ of habeas corpus on November 6, 2014. Roberson acknowledges that this application was denied without written order on June 24, 2015. He signed his federal habeas corpus petition on February 23, 2016.

In his federal habeas petition, Roberson asserts that: (1) his conviction is unlawful because his rape conviction was discharged in 1986, several years before the registration statute was enacted; (2) requiring him to register as a sex offender violates the Ex Post Facto Clause; (3) requiring him to register as a sex offender and punishing him when he did not violates double jeopardy; (4) requiring him to register as a sex offender and punishing him when he did not amounts to cruel and unusual punishment; and (5) he received ineffective assistance of counsel.

After review of the pleadings, the Court ordered Roberson to show cause why his petition should not be dismissed as barred by the statute of limitations. *See* Day v. McDonough, 547 U.S. 198, 210, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). In his response, Roberson argues first that his conviction became final upon the expiration of his time to seek certiorari from the U.S. Supreme Court, which was 90 days after he was convicted. Thus, his limitations period began to run on December 3, 2014, making his petition timely.

Second, Roberson contends that he properly filed his state habeas petition, which is the proper means to seek an out of time appeal. Third, he asserts that the state district court did not apply the limitations bar to his state application and the Texas Court of Criminal Appeals denied his petition without a hearing or written response and thus did not consider the merits of his claims, allowing the federal court to review his claims because the state court did not apply a procedural bar. Fourth, Roberson states that he is challenging a defect in his indictment, and because an indictment is jurisdictional, he can raise the issue at any time. He further asserts that "an actual innocence/wrongful conviction habeas corpus petition is not barred by the statute of limitations" and that his petition was "properly filed" under Villegas v. Johnson, 184 F.3d 467, 472 (5th Cir. 1999).

**II. Legal Standards and Analysis**

A. The Law on Limitations

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). Roberson 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.

This statute was enacted as part of the Anti-Terrorism and Effective Death Penalty Act on April 24, 1996. Roberson did not take a direct appeal, meaning that his conviction became final when his time to appeal expired, on August 31, 2013. Because this date was a Saturday and the following Monday was a federal holiday, Roberson's conviction became final on Tuesday, September 3, 2013. His limitations period began to run at that time and expired on September 3, 2014.

Roberson's argument that his limitations period began to run upon the expiration of the time in which to seek certiorari review from the U.S. Supreme Court lacks merit because he did not take a direct appeal through the courts of the State of Texas and cannot seek certiorari review from a conviction by a trial court. In Roberts v. Cockrell, 319 F.3d 690, 693 & n.14 (5th Cir. 2003), the Fifth Circuit stated that the Supreme Court rules provide that the certiorari petition must be filed within 90 days of the date that the state court of last resort entered judgment, and the certiorari review is of the decision of a state court of last resort.

The Fifth Circuit explained that if the petitioner took a direct appeal of his conviction to the state court of last resort, which is the Texas Court of Criminal Appeals, then the conviction becomes final on the conclusion of direct review or the expiration of the time for seeking such review. This period includes the 90 days allowed for a petition to the Supreme Court following the entry of judgment by the state court of last resort.

However, if the habeas petitioner stopped his direct appeal before that point (i.e. before taking his appeal to the state court of last resort), then the conviction becomes final when the time for seeking further direct review in the state court expires. Roberts, 319 F.3d at 694; Butler v. Cain, 533 F.3d 314, 317 (5th Cir. 2008).

In this case, as in Butler, Roberson did not take a direct appeal to the state court of last resort. As a result, because Roberson did not file a direct appeal, his conviction became final at the expiration of the time in which he could do so, on September 3, 2013. Roberson does not get the benefit of the 90-day period in which to seek certiorari because he did not take a direct appeal, and his limitations period expired on September 3, 2014, unless extended through the operation of other factors.

In this regard, Roberson does not point to any state-create impediments which prevented him from seeking habeas corpus relief in a timely manner. Nor does he show that he is asserting a right which has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. Roberson does not allege, nor does it appear, that any of the factual predicates of his claim could not have been discovered in a timely manner.

While Roberson did file a state habeas corpus petition, he states this petition was filed in on November 6, 2014, some two months after the limitations period had expired. The Fifth Circuit has held that a state habeas corpus petition filed after the limitations period has expired does not revive any part of this period. Villegas v. Johnson, 184 F.3d 467, 472 (5th Cir. 1999) (expired limitations period cannot be revived by filing a state habeas petition). Roberson's state habeas petition had no effect upon the limitations period, which period expired on September 3, 2014.

B. Equitable Tolling

Nor has Roberson 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 v. Johnson, 174 F.3d 710, 713 n.11 (5th Cir. 2000).

The Supreme Court has held that equitable tolling applies in federal habeas corpus challenges to state convictions, but a petitioner may be entitled to such 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. 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).

Roberson 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 649. Roberson offers no viable explanation for the lapse in time between the date his conviction became final, on September 3, 2013, and the date he sought state habeas corpus relief, on November 6, 2014.

This lapse of time plainly does not reflect reasonable diligence. *See* Nelms v. Johnson, No. 01-10696, 51 F.App'x 482, 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"); Fisher, 174 F.3d at 713 (petitioner who filed his state

habeas petition two days before the limitations period expired and sought federal habeas corpus relief 17 days after the limitations period expired did not exercise due diligence even though he did not learn about the AEDPA or the statute of limitations until 43 days after the limitations period began to run).

C. Actual Innocence

Nor has Roberson 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).

Roberson points to no new evidence in light of which no reasonable juror would have voted to convict him. He argues that the retroactive application of the sex offender registration law to him violates the Ex Post Facto Clause, but such registration laws are non-punitive and therefore do not violate the Ex Post Facto Clause. Smith v. Doe, 538 U.S. 84, 95-96, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). The Fifth Circuit has repeatedly cited Smith in holding that the Texas sex offender statute does not violate the Ex Post Facto Clause. King v. McCraw, 559 F.App'x 278, 2014 U.S. App. LEXIS 4400 (5th Cir. ); Hayes v. Texas, 370 F.App'x 508, 2010 U.S. App. LEXIS 5643, 2010 WL 1141631 (5th Cir., March 18, 2010).

D. Roberson's Other Contentions

The sex offender registration law does not violate double jeopardy because it does not inflict multiple punishments for the same offense. United States v. Brown, 571 F.3d 492, 497 (5th Cir. 2009). The law is non-punitive and therefore does not inflict cruel or unusual punishment. Smith, 538 U.S. at 95; Creekmore v. Attorney General of Texas, 341 F.Supp.3d 648, 663 (E.D.Tex. 2004). Roberson has failed to show any defect in the indictment sufficient to deprive the trial court of jurisdiction. *See* Texas Constitution, Section V, art. 12(b) (presentment of an indictment invests the court with jurisdiction over the cause). The State of Texas does not have a statute of limitations for bringing habeas corpus petitions so there is no procedural bar for the state courts to apply. Villegas, 184 F.3d at 471 (noting that Texas places no absolute time limitations on the filing of habeas corpus applications in non-capital cases); *see also* Ex Parte Perez, 398 S.W.3d 206, 213 (Tex.Crim.App. 2013); Ex Parte Scott, 190 S.W.3d 672, 675 (Tex.Crim.App. 2006) (Cochran, J., concurring) (stating that "Texas, unlike the federal system, does not have a statute of limitations which requires a petition for habeas corpus to be filed within a certain period of time.")

Roberson cites Villegas in arguing that his state habeas petition was "properly filed." In that case, the Fifth Circuit held that a petition which conformed with the state's applicable procedural filing requirements, regardless of its merit or whether it was successive under state law, was "properly filed" and thus could toll the federal limitations period. There is no dispute that Roberson's state habeas petition conformed with state procedural requirements and thus was properly filed; however, it did not serve to toll the limitations period because it was filed after this period expired. Villegas, 184 F.3d at 472 (a prisoner cannot revive an expired limitations period simply by filing a state petition in conformity with basic procedural requirements). None of Roberson's arguments show any basis for equitable tolling of the statute of limitations. 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.

**III. Conclusion**

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, 120 S.Ct. 1595, 1604 (2000).

In this case, reasonable jurists would not find it debatable whether the district court was correct in its procedural ruling that Roberson's petition is barred by the statute of limitations. Roberson 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 26th day of September, 2016.**

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE