Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-50943

CHARLTON BRADSHAW,

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 Western District of Texas
USDC No. 5:14-CV-619

Before KING, JONES, and GRAVES, Circuit Judges.

PER CURIAM:*

Charlton Bradshaw, a Texas prisoner, appeals the district court's dismissal of his 28 U.S.C. § 2254 petition under the Antiterrorism and Effective Death Penalty Act of 1996. We granted a certificate of appealability on the procedural issue of whether the § 2254 petition was timely in light of Bradshaw's efforts to obtain rehearing of his petition for discretionary review

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

in state court. Bradshaw allegedly filed a timely motion for rehearing within 15 days of the denial of his petition for discretionary review of his state court conviction pursuant to Texas Rule of Appellate Procedure 79.1. Upon learning that the Texas Court of Criminal Appeals never received the motion, he filed another motion for rehearing outside of the 15-day period in which he asserted that the first motion was timely under the prison mailbox rule and attached documentary evidence of the mailing of his prior motion. The Texas Court of Criminal Appeals then denied Bradshaw's motion for rehearing as "untimely," though it did not explain why the prison mailbox rule did not apply. The issue here is whether the prison mailbox rule applies as to render his motion for rehearing timely and therefore properly filed. If so, then his § 2254 petition is timely. As the determination of whether his motion for rehearing was properly filed is a matter of state procedural law, we defer to the Texas Court of Criminal Appeals's conclusion of untimeliness and implicit refusal to apply the prison mailbox rule. Accordingly, we now AFFIRM.

I.

On March 1, 2011, Charlton Bradshaw was convicted of capital murder and sentenced to life in prison. A couple of months later, the judgment was affirmed on direct appeal. *See Bradshaw v. State*, No. 04-11-00173-CR, 2012 WL 1648218, at *1 (Tex. App.—San Antonio May 9, 2012, pet. denied) (mem op., not designated for publication). The Texas Court of Criminal Appeals ("TCCA") denied Bradshaw's petition for discretionary review ("PDR") on October 3, 2012. Bradshaw alleges that he filed a timely motion for rehearing on October 15, 2012. About a month after Bradshaw purportedly mailed the motion for rehearing, he sent a letter inquiring about the receipt of the motion. The TCCA responded, stating that they had not received the motion.

On February 1, 2013, Bradshaw filed a motion with the TCCA that sought permission to resubmit his original motion for rehearing, invoking the

prison mailbox rule ("second motion for rehearing"). Along with this motion, he sent a document that shows he mailed something to the TCCA on October 15, 2012, though he did not attach a copy of the original motion. Ten days later, the TCCA determined that his motion for rehearing was "untimely" and stated that "[n]o action will be taken in this matter."

Bradshaw then filed his first state habeas petition on September 17, 2013. The TCCA dismissed the petition as noncompliant with Texas Rule of Appellate Procedure 73.1. He then filed a second state habeas petition on February 21, 2014. The TCCA denied the petition without written order on June 18, 2014. Bradshaw filed the instant § 2254 petition on July 2, 2014. The State moved to dismiss the petition as untimely. The magistrate judge recommended granting this motion. The district court overruled Bradshaw's objections, adopted the magistrate judge's recommendation, and dismissed the petition as untimely. Bradshaw appealed.

II.

We review de novo a district court's dismissal of a habeas petition as time-barred. *Richards v. Thaler*, 710 F.3d 573, 575 (5th Cir. 2013). The Antiterrorism and Effective Death Penalty Act ("AEDPA") establishes a one-year period of limitation for state prisoners to file for federal habeas relief. 28 U.S.C. § 2244(d)(1). This period begins to run from the latest of four specified dates set forth in § 2244(d)(1). The first of these dates is relevant to this case: "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). When, as here, a petitioner neither stops the appeal process before the entry of judgment by the state court of last resort nor pursues direct review with the Supreme Court, the one-year period starts to run from "the expiration of the time for seeking [direct] review." *Id.*; *see Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003).

Specifically, the expiration of that time occurs at the conclusion of the 90 days that a party has to file for certiorari with the clerk of the Supreme Court. *See* Sup. Ct. R. 13.1; *Roberts*, 319 F.3d at 694. Those 90 days are calculated from (1) the date of the judgment entered by a state court of last resort, after denial of discretionary review, or (2) if a timely petition for rehearing is filed or an untimely petition for rehearing is entertained, either the date of the denial of rehearing or the subsequent entry of judgment if rehearing is granted. *See* Sup. Ct. R. 13.1, 13.3; *England v. Quarterman*, 242 F. App'x 155, 157–58 (5th Cir. 2007).

The date the judgment became final is at issue here. The State argues that Bradshaw's motion for rehearing was untimely and so the judgment became final 90 days after the date that the TCCA denied the PDR, which was October 3, 2012. According to the State, the one-year period started to run from the date the judgment became final and ended before Bradshaw filed his § 2254 petition. Additionally, the State contends that neither of the two state habeas applications tolled the one-year period because the first was improperly filed and the second was properly filed but outside of the one-year period. In contrast, Bradshaw asserts that his first motion for rehearing of his PDR was timely under the prison mailbox rule and therefore the judgment became final 90 days after the date of the denial of his second motion for rehearing, which was February 11, 2013. He concedes that his first state habeas application did not toll the one-year period, but states that the second did because it was properly filed within that period.

"Although federal, not state, law determines when a judgment is final for federal habeas purposes, a necessary part of the finality inquiry is determining whether the petitioner is still able to seek further direct review." *Butler v. Cain*, 533 F.3d 314, 317 (5th Cir. 2008). "As a result, this court looks to state law in determining how long a prisoner has to file a direct appeal." *Id.*

Pursuant to Texas Rule of Appellate Procedure 79.1, a party must file a motion for rehearing within 15 days from the denial of the PDR. Bradshaw's first motion for rehearing—which the TCCA never received—was purportedly filed within this period, but his second motion was not. The district court failed to accurately address Bradshaw's contention that his § 2254 petition was timely because he filed a timely motion for a rehearing of his PDR. We thus granted a certificate of appealability on the procedural issue of whether the § 2254 petition was timely in light of Bradshaw's efforts to obtain a rehearing of his PDR.

Bradshaw argues that he filed a timely motion for rehearing of his PDR because the prison mailbox rule applies to his first motion. "[T]he ultimate question is whether [the prisoner's] state petition complied with [the TCCA's] procedural requirements." *Stoot v. Cain*, 570 F.3d 669, 671 (5th Cir. 2009) (per curiam). "[S]tate courts have the right to interpret state rules of filing." *Richards*, 710 F.3d at 577 (quoting *Causey v. Cain*, 450 F.3d 601, 605 (5th Cir. 2006)). As such, we "are not bound" by *Houston v. Lack*'s "construction of federal filing rules." *Causey*, 450 F.3d at 605. In *Houston*, the Supreme Court concluded that a pro se prisoner's notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)—which was mailed before, but officially filed by the court clerk after, the 30-day deadline—was deemed filed on the date it was delivered to prison officials for mailing. *See* 487 U.S. 266, 269, 276 (1988). We have recognized that in *Campbell v. State*, 320 S.W.3d 338, 344 (Tex. Crim. App. 2010), the TCCA found *Houston*'s reasoning persuasive and held that the prison mailbox rule generally applies in criminal proceedings. *See Richards*, 710 F.3d at 577. *Campbell*, like *Houston*, involved a scenario in which the prisoner mailed a pleading before, but the court clerk did not officially file the pleading until after, the relevant deadline. *See* 320 S.W.3d at 340. The TCCA

has never expressly addressed the issue of whether the prison mailbox rule applies when the document is never received by the court, as here.

Yet, today we do not need to engage in a lengthy examination of Texas law in order to make an *Erie* guess of what Texas courts would do in this lost-mail scenario. In the case at hand, Bradshaw presented the prison mailbox rule argument to the TCCA as the reason that his first motion for rehearing was timely, along with documentary evidence showing that he had sent mail to the TCCA on the date that he purportedly sent that motion in (though he did not attach a copy of the original motion). *See Stoot*, 570 F.3d at 672 ("[R]eference to prison mail logs usually answers the question of when the petition was actually mailed."). Despite Bradshaw's actions, the TCCA made a determination that his motion for rehearing was "untimely." It therefore implicitly rejected Bradshaw's timeliness argument based on the prison mailbox rule.[1] As the question of "when a state application is properly filed is a question of state law," *Richards*, 710 F.3d at 577, we defer to the TCCA's implicit refusal to apply the prison mailbox rule to this lost-mail scenario.

As the TCCA determined that the motion was improperly filed, the judgment became final 90 days after the TCCA denied the PDR. Accordingly, Bradshaw's § 2254 petition was filed outside of the one-year period of limitation. Further, his second motion for rehearing was also filed outside of this period and thus could not toll it. *See Wion v. Quarterman*, 567 F.3d 146,

---

[1] The TCCA did not set forth the grounds upon which it based its untimeliness determination. The potential grounds are (1) Bradshaw was not reasonably diligent in following up on his first motion, (2) his documentary proof was insufficient, and (3) the prison mailbox rule simply did not apply to this lost-mail situation. The first two are unlikely as Bradshaw repeatedly followed up on the first motion for rehearing and filed a second motion, as well as submitted evidence that mail was sent on the date that he allegedly sent in his first motion. Accordingly, the most likely reason for the TCCA's decision was that the prison mailbox rule did not apply to this lost-mail scenario.

148 (5th Cir. 2009) (stating that a state habeas application filed after the one-year limitation period has no tolling effect).

Stoot is distinguishable. In *Stoot*, the Louisiana prisoner allegedly mailed, but the Supreme Court of Louisiana ("SCLA") never received, a petition for discretionary review of the denial of state post-conviction relief. 570 F.3d at 671. When the prisoner learned that the SCLA did not receive his first petition, he sent another one after the deadline for appeal had passed. *Id.* The SCLA denied his petition in a one-word opinion. *Id.* at 670. We held, absent Louisiana Supreme Court caselaw directly on point, that a pleading purportedly mailed, yet never received, may benefit from the prison mailbox rule. *Id.* at 671. In prior caselaw, we have construed a one-word opinion from the SCLA to mean that the SCLA found the petitioner's application for review to be untimely. *See, e.g.*, *Butler*, 533 F.3d at 318–19. Even assuming arguendo that the SCLA's one-word opinion in *Stoot* indicates that the SCLA found the prisoner's petition to be untimely, *Stoot* can be distinguished from the case at hand. Our opinion in *Stoot* did not indicate that the prisoner there ever directly raised his mailbox-rule argument to the SCLA concerning the timeliness of his first petition. There was no indication in *Stoot* that the SCLA had an opportunity to confront whether the prison mailbox rule applied to that lost petition, as the TCCA had here.

We recognize that other circuits have held—in cases that concern either federal procedural law or the procedural law of other states—that the prison mailbox rule applies when the relevant court never received the filing. *See, e.g.*, *United States v. McNeill*, 523 F. App'x 979, 982 (4th Cir. 2013) (federal law); *Ray v. Clements*, 700 F.3d 993, 1004 (7th Cir. 2012) (Wisconsin law); *Allen v. Culliver*, 471 F.3d 1196, 1198 (11th Cir. 2006) (per curiam) (federal law); *Huizar v. Carey*, 273 F.3d 1220, 1222–23 (9th Cir. 2001) (California law).

We emphasize that our holding is made in reference to the TCCA's decision regarding Texas procedural law in this particular case. The TCCA has applied the prison mailbox rule where the pleading arrives to the court in a delayed fashion, but not where the pleading never arrives. *See Campbell*, 320 S.W.3d at 340, 344. Here, the petitioner sought the application of the rule to his never-received pleading, and the TCCA chose not to apply the rule. Our holding is narrow and limited to the facts at hand. We are not imposing an additional requirement on the prison mailbox rule. We are simply choosing not to extend the benefits of the rule where the TCCA had the opportunity to do so and did not. Should the TCCA expressly extend the prison mailbox rule to a lost-mail scenario in the future, or the record show that the TCCA never had the mailbox-rule argument presented to it, we would confront that scenario then and may reach a different result than the one today. *See Richards*, 710 F.3d at 577–78 (recognizing a change in Texas law applying the prison mailbox rule and the abrogation of a prior case of this circuit applying the old law, and then applying the new Texas law).

III.

For the foregoing reasons, Bradshaw's motion for rehearing was untimely, and therefore his federal habeas petition was untimely. Accordingly, we AFFIRM the judgment of the district court.

JAMES E. GRAVES, JR., Circuit Judge, dissenting:

Charlton Bradshaw has offered sufficient evidence that he timely filed a motion for rehearing of his petition for discretionary review (PDR) in Texas state court and, thus, that his federal habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was timely. Because I would vacate the district court's dismissal of Bradshaw's 28 U.S.C. § 2254 petition and remand, I respectfully dissent.

Bradshaw's PDR was denied by the Texas Court of Criminal Appeals (TCCA) on October 3, 2012. Bradshaw asserts that he timely filed a motion for a rehearing of his PDR in state court and that the filing tolled the one-year limitations period for filing his federal habeas application under AEDPA. *See* 28 U.S.C. § 2244(d)(1), (2). The state court apparently never received or filed Bradshaw's motion. But, Bradshaw has offered documentary evidence showing that he timely mailed the motion to the TCCA from the prison mailroom on "10-15-12." Further, Bradshaw repeatedly followed up on the motion he said he mailed and then filed a second motion after he found out the first one was not filed. The second motion was denied as untimely on February 11, 2013. The timeliness of Bradshaw's attempt to obtain a PDR rehearing determines when his conviction became final and when the limitations period began to run.

The district court did not decide whether the missing rehearing motion was timely, but acknowledged that a timely motion for rehearing would have delayed the finality of Bradshaw's conviction. However, as we said in granting a Certificate of Appealability (COA), the court's analysis did not properly account for the effect of the delayed finality combined with the tolling effect of

Bradshaw's second state habeas petition, which was filed within a year of finality.[1]

Under the prison mailbox rule, a pro se petitioner's pleading "is deemed filed at the moment it is delivered to prison authorities" for mailing. *Causey v. Cain*, 450 F.3d 601 (5th Cir. 2006). The majority affirms the district court's dismissal of Bradshaw's 28 U.S.C. § 2254 petition, saying it defers to the TCCA's "implicit refusal to apply the prison mailbox rule." I disagree with this conclusion.

The state court docket reflects that, after Bradshaw made multiple status inquiries and requests for assistance regarding his original motion for rehearing that were "refused" by the court, an "untimely" motion for rehearing was received on February 11, 2013. The disposition of that second motion states only, "Untimely Filed," and includes nothing to suggest that the court considered and rejected application of the prison mailbox rule.

We addressed a similar issue in *Stoot v. Cain*, 570 F.3d 669, 672 (5th Cir. 2009). In *Stoot*, Louisiana prisoner Anthony Ray Stoot purportedly mailed an appeal from the denial of post-conviction relief, but the Supreme Court of Louisiana never received it. *Id.* at 670-71. Stoot asked a family member to investigate after he failed to receive confirmation of receipt of his petition. *Id.* at 671. The family member discovered that the petition was never received and Stoot filed a second petition which was "denied." The district court then dismissed Stoot's federal application as untimely. *Id.* at 670-71. On appeal, we concluded that Louisiana would apply the prison mailbox rule even when the timely pleading was never received by the state court. *Stoot*, 570 F.3d at 671. Specifically, we concluded that:

---

[1] In granting a COA, we also concluded that the available pleadings and record did not clearly show that a COA was not warranted on Bradshaw's four claims of ineffective assistance of counsel.

> [A] pro se prisoner's pleading is deemed filed on the date that the prisoner submits the pleading to prison authorities to be mailed, regardless of whether the pleading actually reaches the court. Under such a rule, it is of course incumbent upon the petitioner to diligently pursue his petition. A failure to inquire about a lost petition is strong evidence that the petition was, in fact, never sent.

Id. at 672. After noting that "reference to prison mail logs usually answers the question of when the petition was actually mailed," we concluded that "we are ill-equipped to determine whether Stoot's allegations are true." *Id.* at 672. Thus, we reversed and remanded to the district court for a factual inquiry into whether Stoot submitted a timely petition.

The majority attempts to distinguish *Stoot* on the basis that, "[o]ur opinion in *Stoot* did not indicate that the prisoner there ever directly raised his mailbox-rule argument to the SCLA concerning the timeliness of his first petition." However, our opinion also did not indicate that Stoot failed to present such an argument. This court said: "In his objections to the magistrate judge's report, Stoot, for the first time, asserted that he had mailed an earlier petition to the Louisiana Supreme Court on November 23, 2005, within the Rule X, § 5(a) deadline." *Stoot*, 570 F.3d at 671. There is no discussion of what Stoot did or did not argue to the Louisiana Supreme Court – only what he argued in the district court. Further, the Louisiana Supreme Court opinion offers no insight into what Stoot argued. *Stoot v. Louisiana*, 939 So.2d 1271 (La. 2006). Thus, I perceive no basis for distinction. Regardless, even if Stoot did not raise a mailbox-rule argument to the Louisiana Supreme Court, that is not sufficient to distinguish it from this case.

As the majority acknowledges, we already know that Texas applies the prison mailbox rule in both civil and criminal cases. *See Richards v. Thaler*, 710 F.3d 573, 577-78 (5th Cir. 2013).

Rejecting application of the prison mailbox rule when courts do not receive filings that were delivered to prison officials for mailing contradicts the very nature of the rule. As the United States Supreme Court has said:

> The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30-day deadline. Unlike other litigants, pro se prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the pro se prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service (or a private express carrier); and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. Pro se prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them. Worse, the pro se prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the pro se prisoner delivers his notice to the prison authorities, he can never be sure that it will ultimately get stamped "filed" on time. And if there is a delay the prisoner suspects is attributable to the prison authorities, he is unlikely to have any means of proving it, for his confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received. Unskilled in law, unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access - the prison authorities - and the only information he will likely have is the

> date he delivered the notice to those prison authorities and the date ultimately stamped on his notice.

Houston v. Lack, 487 U.S. 266, 270-72 (1988).

There is no exception for mail *never* "stamped 'filed.'" *Id.* To suggest that there is a distinction is to open the door for public officials to intentionally discard pro se inmate filings, leaving the inmates without recourse.

Further, the majority cites no authority for such a distinction. The majority attempts to derive support from Texas cases where the pleading arrived after the deadline. *See Campbell v. State*, 320 S.W.3d 338, 340, 344 (Tex. Crim. App. 2010). But *Campbell* says nothing about the prison mailbox rule not applying when a filing is never initially received. Instead, the language in *Campbell* and other similar cases supports the conclusion that Bradshaw's pleading was timely. Bradshaw's initial pleading was not received. After diligently following up on that pleading, Bradshaw resubmitted it. That resubmitted pleading arrived after the filing deadline – just like Campbell's pleading arrived after the deadline. However, since both timely submitted their pleadings to prison authorities for mailing, both should receive the benefit of the prison mailbox rule.

Additionally, as the majority acknowledges, every other circuit to consider this issue has concluded that the prison mailbox rule clearly applies even when the court never receives the filing. *See United States v. McNeill*, 523 F. App'x 979, 982 (4th Cir. 2013); *Ray v. Clements*, 700 F.3d 993, 1004 (7th Cir. 2012); *Jones v. Heimgartner*, 602 F. App'x 705 (10th Cir. 2015); and *Allen v. Culliver*, 471 F.3d 1196, 1198 (11th Cir. 2006); and *Huizar v. Carey*, 273 F.3d 1220, 1223 (9th Cir. 2001). The only cases not applying the rule are from states such as Nevada, which "has squarely rejected the prison mailbox rule for the filing of its state habeas corpus petitions." *Orpiada v. McDaniel*, 750 F.3d

1086, 1087 (9th Cir. 2014). Texas has not rejected the prison mailbox rule. *See Richards*, 710 F.3d at 577-78.

The issue here is not an extension of the prison mailbox rule, but merely the application of the existing rule under *Houston*, 487 U.S. at 270-72. Instead, the majority has improperly imposed an additional requirement that the pleading actually reach the court and be acknowledged by the court. This negates the very existence of the rule in Texas. As there is no authority for doing so and it is contrary to both binding precedent and persuasive authority, I would vacate the district court's dismissal of Bradshaw's 28 U.S.C. § 2254 petition and remand. Thus, I respectfully dissent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHARLTON BRADSHAW, TDCJ-CID NO. 1703357,	§	No. 5:14-CV-619-DAE
Petitioner,	§	
vs.	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice – Institutional Division,	§	
Respondent.	§	

ORDER (1) ADOPTING REPORT AND RECOMMENDATION, (2) GRANTING RESPONDENT'S MOTION TO DISMISS, AND (3) DENYING PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

Before the Court is a Report and Recommendation filed by Magistrate Judge Pamela Mathy. (Dkt. # 22.) Petitioner Charlton Bradshaw ("Bradshaw") has filed Objections to the Magistrate's Report and Recommendation. (Dkt. # 26.) Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing. After careful consideration, and for the reasons given below, the Court **ADOPTS** the Magistrate Judge's Report and Recommendation

(Dkt. # 22), **GRANTS** Respondent's Motion to Dismiss (Dkt. # 16), and **DENIES** Bradshaw's Petition for Writ of Habeas Corpus (Dkt. # 1).

BACKGROUND

On March 1, 2011, Bradshaw was found guilty of capital murder by a jury in the 186th District Court of Bexar County, Texas. (Dkt. # 12-3, at 116–17.) At trial, the State sought to enhance Bradshaw's punishment under the habitual offender statute by alleging two prior felony convictions. (Dkt. # 12-2, at 27–28.) The trial court sentenced Bradshaw to life imprisonment. (Dkt. # 12-3, at 116–17.) On May 9, 2012, the Fourth Court of Appeals of Texas affirmed Bradshaw's conviction in a non-published opinion. Bradshaw v. State, No. 04-11-00173-CR, 2012 WL 1648218 (Tex. App.—San Antonio 2012, pet. ref'd). On October 3, 2012, the Texas Court of Criminal Appeals refused Bradshaw's petition for discretionary review. Bradshaw v. State, No. PD-0665-12 (Tex. Crim. App. Oct. 3, 2012).

On September 17, 2013, Bradshaw filed his first state habeas corpus application challenging his conviction. (Dkt. # 12-12.) However, on January 8, 2014, the Texas Court of Criminal Appeals dismissed the application for failing to comply with procedural rules. (Dkt. # 12-12.) Bradshaw then filed a second habeas application on February 21, 2014. (Dkt. # 12-15.) The Texas Court of

Criminal Appeals denied this application without a written order on June 6, 2014. (Dkt. # 12-16.)

On July 7, 2014, Bradshaw filed a federal habeas petition in this Court pursuant to 28 U.S.C. § 2254. (Dkt. # 1.) Bradshaw's pro se petition appears to allege the following: (1) the trial court violated his right to a public trial by excluding his family and the public from the courtroom during jury selection; (2) the Fourth Court of Appeals erred in finding sufficient evidence of his guilt; (3) ineffective assistance of trial counsel by failing to object to the exclusion of his family and the public during jury selection; (4) ineffective assistance of trial counsel by failing to contact and interview Juan Herrera and Calvin Beard; (5) ineffective assistance of trial counsel by failing to present exculpatory evidence; (6) ineffective assistance of trial counsel by failing to impeach witness Tiffany Barnett; (7) ineffective assistance of counsel by failing to interview alibi witnesses; (8) the prosecution committed perjury, misstated the law, erred by vouching for a witness, used inflammatory, misleading, and inadmissible evidence, and failed to investigate inconsistencies in testimony; (9) ineffective assistance of trial counsel by failing to properly object and preserve error; (10) ineffective assistance of appellate counsel by stating the Bradshaw intended to rob the victim, and failing to challenge the sufficiency of the evidence; (11) appellate counsel denied him his right to another attorney; (12) his conviction is a fundamental

miscarriage of justice; (13) he is actually innocent of capital murder; (14) the State failed to prove intent; and (15) the evidence was insufficient to prove guilt. (Dkt. # 1.)

On August 25, 2014, Bradshaw filed a brief in support of his petition. (Dkt. # 7.) On December 16, 2014, Respondent William Stephens filed a Motion to Dismiss Bradshaw's petition. (Dkt. # 16.) Bradshaw filed a reply on January 30, 2015. (Dkt. # 20.) On February 6, 2015, United States Magistrate Judge Pamela Mathy issued a Report and Recommendation recommending that this Court grant Respondent's motion and deny Bradshaw's petition. (Dkt. # 22.) On March 3, 2015, Bradshaw filed objections to the Report and Recommendation. (Dkt. # 26.)

LEGAL STANDARD

I. Review of a Magistrate Judge's Report and Recommendation

The Court must conduct a de novo review of any of the Magistrate Judge's conclusions to which a party has specifically objected. See 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). The objections must specifically identify those findings or recommendations that the party wishes to have the district court consider. Thomas v. Arn, 474 U.S. 140, 151 (1985). A district court need not consider "[f]rivolous,

conclusive, or general objections." Battle v. U.S. Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

Findings to which no specific objections are made do not require de novo review; the Court need only determine whether the Report and Recommendation is clearly erroneous or contrary to law. United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir. 1989).

II. Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254

Under the Anti-Terrorism and Death Penalty Act of 1996 ("AEDPA"), a state prisoner may not obtain relief with respect to a claim adjudicated on the merits in state court unless the adjudication (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court proceedings. 28 U.S.C. § 2254(d).

A decision is clearly contrary to established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. William v. Taylor, 529 U.S.

362, 405–06 (2000). Relief is only available if the state court applied clearly established federal law unreasonably; a Petitioner is not entitled to relief if the state court merely did so erroneously or incorrectly. Id. The only way a state prisoner may show that a state court unreasonably applied clearly established federal law is by showing that there was no reasonable basis for the state court's decision. Cullen v. Pinholster, 563 U.S. 170, 187 (2011).

A federal habeas court may overturn a state court's application of federal law only if it is so erroneous that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedent." Harrington v. Richter, 562 U.S. 86, 101 (2011). Section 2254(d) imposes a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Woodford v. Viscotti, 537 U.S. 19, 24 (2002). Generally, a state court's factual findings must be presumed to be correct and can only be rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Review under § 2554(d) is limited to the record that was before the state court that adjudicated the claim on the merits. Woodford, 537 U.S. at 24.

DISCUSSION

Respondent's motion to dismiss argues that Bradshaw's petition for habeas relief is time-barred pursuant to 28 U.S.C. § 2244(d). (Dkt. # 16.) Section

2244(d) imposes a one-year statute of limitations on state prisoners filing habeas petitions. 28 U.S.C. § 2244(d). Respondent contends that the statute of limitations expired on January 2, 2014, one calendar year after January 2, 2013, the date Bradshaw's judgment became final. (Dkt. # 16, at 7.) Respondent argues that Bradshaw's judgment was final on January 2, 2013, because the Court of Criminal Appeals refused Bradshaw's petition for discretionary review on October 3, 2012, and Bradshaw then had ninety days, or until January 2, 2013, to file a petition for writ of certiorari to the United States Supreme Court, but did not file one. (Id.) Therefore, according to Respondent, Bradshaw's statute of limitations expired on January 2, 2014. (Id.) Respondent also argues that Bradshaw's limitations period was not subject to any tolling. (Id.)

Under the AEDPA, the one year required to file a federal petition for habeas corpus relief after final judgment may be tolled while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment of claim is pending." 28 U.S.C. § 2244(d)(2). Additionally, 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. 2010). The determination of whether "exceptional circumstances" exists is determined on a case-by-case basis. Alexander v. Cockrell, 294 F.3d 626, 629 (5th Cir. 2002).

A review of the record indicates that Bradshaw's disciplinary action became final, and his limitation period began to run, not later than January 2, 2013, ninety days subsequent to the Court of Criminal Appeal's refusal of his petition for discretionary review. And because he did not timely, if ever, file a petition for writ of certiorari to the United States Supreme Court, the AEDPA's one-year deadline for the filing of Bradshaw's federal habeas corpus petition therefore expired on January 2, 2014. However, Bradshaw's petition was not received by the Clerk of this Court until July 7, 2014. (See Dkt. # 1.) Accordingly, without any grounds for equitable or statutory tolling, Bradshaw's petition is time-barred.

Bradshaw, however, objects to the Magistrate Judge's Report and Recommendation on the following five grounds, each discussed in turn below.

I. Confiscation of Legal Work

In his first objection to the Magistrate Judge's Report and Recommendation, Bradshaw argues that the confiscation of his legal paperwork entitles him to equitable tolling. (Dkt. # 26, at 4.) He contends that on July 15, 2013, his legal paperwork relevant to this case was confiscated and that it was not returned to him until November 5, 2013. (Id.) Nevertheless, this circumstance is not sufficient to equitably toll the limitations period. The record demonstrates, and Bradshaw has admitted, that his relevant legal papers were returned to him two months prior to the expiration of the statute of limitations. Furthermore,

Bradshaw's petition was filed almost eight months subsequent to his return of the paperwork, and six months subsequent to the expiration of the statute of limitations. Such circumstances are not "extraordinary" for purposes of equitably tolling the statute of limitations in this case. Bradshaw's objection on this ground is overruled.

II. Second State Habeas Application

Bradshaw further objects to the Magistrate Judge's conclusion that even if tolling were applied in his case, his federal habeas petition would still be untimely. (Dkt. # 26, at 6.) As the basis for his argument, Bradshaw contends that he waited 119 days, or until February 11, 2013, for the Court of Criminal Appeals to rule on his motion for rehearing regarding its decision on his petition for discretionary review. (Id. at 7.) Bradshaw agrees that he would have ninety days, or until May 13, 2013, until his conviction became final, and that his limitations period would therefore expire on May 13, 2014. (Id.) Bradshaw states that while his first state habeas application was denied on procedural grounds, which would not toll the limitations period, his second state habeas application was properly filed and thus tolled the limitations period for the filing of his federal petition for writ of habeas corpus. (Id.)

Bradshaw's contention is incorrect. Bradshaw filed his second state habeas application on February 21, 2014, after the limitations period under

§ 2244(d)(2) to file his federal petition expired on January 2, 2014. See Scott v. Johnson, 227 F.3d 260, 263 (5th Cir. 2000) ("Scott's state habeas application did not toll the limitation period under § 2244(d)(2) because it was not filed until after the period of limitation had expired." (emphasis in original)). Therefore, his second state habeas application had no bearing on the timeliness of his federal application. Once the federal limitations period expired, "[t]here was nothing to toll." Butler v. Cain, 533 F.3d 314, 318 (5th Cir. 2008). Accordingly, Bradshaw's objection on this ground is overruled.

III. Newly Submitted Evidence

Bradshaw also objects the Magistrate Judge's conclusion that "Bradshaw has not demonstrated that more likely than not, in light of newly submitted evidence, no juror would find him guilty beyond a reasonable doubt." (Dkt. # 22, at 17.) Bradshaw contends that the Court should apply equitable tolling because newly submitted evidence supports a finding that he was in fact not guilty. (Dkt. # 26, at 10.)

The Supreme Court has recently recognized an equitable exception to the presentation of claims barred by the AEDPA's statute of limitations where a petitioner can demonstrate his actual innocence. McQuiggin v. Perkins, 133 S. Ct. 1924, 1928, 1935 (2013). Demonstration of innocence under this test means that it is more likely than not that no reasonable juror would have convicted the petitioner

in light of the new evidence. Schlup v. Delo, 513 U.S. 298, 327 (1995). In determining "actual innocence," a federal district court is not bound by the rules of admissibility that govern at trial and instead may consider the probative weight of evidence that was either excluded or unavailable at trial. Id. at 327–28. Types of new reliable evidence that may be considered include exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial. A habeas court must consider all evidence, both old and new, incriminating and exculpatory. House v. Bell, 547 U.S. 518, 537 (2006). The Schlup standard does not require absolute certainty about a petitioner's guilt or innocence. Id. at 538.

Bradshaw has not presented sufficient evidence that would equitably toll the limitations period in this case. Bradshaw relies on what he considers to be new evidence that his trial counsel's notes indicate that jurors could not agree on who actually did the stabbing—Bradshaw or his accomplice. (Dkt. # 26, at 9.) However, the trial notes, included in Bradshaw's evidence, indicate that while the jurors stated that they could not agree on who actually did the stabbing, it was of no consequence because they both participated, and thus were both guilty under the law. (Dkt. # 20, at 23.) This is not sufficient evidence of Bradshaw's actual innocence that would allow equitable tolling in his case. Neither is the trial testimony of witnesses who Bradshaw contends prove his actual innocence—this

testimony cannot be considered newly discovered evidence. (Dkt. # 26, at 8–14.) Bradshaw has not demonstrated that the Schlup exception would apply to his case. Therefore, this objection is overruled.

IV. Hearing

Bradshaw also objects to the Magistrate Judge's recommendation that he is not entitled to an evidentiary hearing on his petition. (Dkt. # 26, at 15.) Bradshaw's objection is meritless. The Supreme Court has held that it is inappropriate for federal courts to conduct evidentiary hearings on § 2254(d) petitions because federal habeas review under that statute "is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen, 563 U.S. at 187. While it is true that a narrow exception within AEDPA allows for evidentiary hearings, the Supreme Court explained that the exception is focused on "limiting the discretion of federal district courts to hold hearings." Id. Because Bradshaw's claims are time-barred, the Magistrate Judge was correct in denying Bradshaw's request for an evidentiary hearing on his § 2254(d) petition. See McCamey v. Epps, 658 F.3d 491, 497 (5th Cir. 2011). Accordingly, Bradshaw's objection is overruled.

V. Certificate of Appealability

Bradshaw also objects to the magistrate judge's recommendation that he is not entitled to a certificate of appealability ("COA"). Under the AEDPA,

before a petitioner may appeal the denial of a habeas corpus petition filed under § 2254, the petitioner must obtain a COA. Miller–El v. Johnson, 537 U.S. 322, 335–36 (2003); 28 U.S.C. § 2253(c)(2). Likewise, under the AEDPA, appellate review of a habeas petition is limited to the issues on which a COA is granted. See Crutcher v. Cockrell, 301 F.3d 656, 658 n. 10 (5th Cir. 2002) (holding that a COA is granted on an issue-by-issue basis, thereby limiting appellate review to those issues).

A COA will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. Tennard v. Dretke, 542 U.S. 274, 282 (2004). To make such a showing, the petitioner need not show he will prevail on the merits, but rather must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. Id. This Court is required to issue or deny a COA when it enters a final Order such as this one adverse to a federal habeas petitioner. Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts.

The showing necessary to obtain a COA on a particular claim depends on the manner in which the District Court disposed of the claim. "[W]here a district court has rejected the constitutional claims on the merits, the showing

required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Tennard, 542 U.S. at 282. In a case in which the petitioner wishes to challenge on appeal this Court's dismissal of a claim for a reason not of constitutional dimension, such as procedural default, limitations, or lack of exhaustion, the petitioner 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 whether this Court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Reasonable minds could not disagree over this Court's conclusions that Bradshaw's federal habeas corpus petition is untimely under § 2244(d), and that Bradshaw is not entitled to the benefits of the doctrine of statutory or equitable tolling in this case. Bradshaw is therefore not entitled to a Certificate of Appealability on any of his claims herein. This objection is overruled.

CONCLUSION

For the foregoing reasons, the Court **ADOPTS** the Magistrate Judge's Report and Recommendation (Dkt. # 22), **GRANTS** Respondent's Motion to Dismiss (Dkt. # 16), and **DENIES** Bradshaw's Petition for Writ of Habeas Corpus (Dkt. # 1). The Court **DENIES** a certificate of appealability in this case.

IT IS SO ORDERED.

DATED: San Antonio, Texas, September 21, 2015.

David Alan Ezra
Senior United States Distict Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CHARLTON BRADSHAW,
TDCJ-CID NO. 1703357,

Petitioner,

v.

WILLIAM STEPHENS,
Director, Texas Department of Criminal Justice - Institutional Division,

Respondent.

CIVIL NO. SA-14-CA-619-DAE

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

To: Honorable David A. Ezra
Senior United States District Judge

Pursuant to the informal referral in the above-styled and numbered cause of action to the undersigned United States Magistrate Judge, and consistent with the authority vested in United States Magistrate Judges under the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 1(d) of the Local Rules for the Assignment of Duties to United States Magistrate Judges in the Western District of Texas, the following report is submitted for your review and consideration.

I. JURISDICTION

The Court has jurisdiction under 28 U.S.C. §§ 2241 and 2254 which provide that a state prisoner's federal petition for a writ of habeas corpus may be filed in the federal district where the petitioner was convicted or where he is incarcerated. Petitioner Charlton Bradshaw ("petitioner" or "Bradshaw"), an inmate currently incarcerated in the Texas Department of

Criminal Justice-Institutional Division, was convicted and sentenced in Bexar County, Texas.[1]

II. PROCEDURAL HISTORY

Bradshaw initiated this case on July 2, 2014, by filing his federal habeas corpus petition pursuant to 28 U.S.C. § 2254.[2] On July 22, 2014, the Court directed service on respondent.[3] On August 25, 2014, Bradshaw filed a memorandum in support of his petition.[4] On October 10, 2014, respondent filed Bradshaw's state court records.[5] On December 16, 2014, after two extensions of time, respondent filed his motion to dismiss, arguing that Bradshaw's petition is time-barred.[6] On December 17, 2014, the Court entered an order calling on Bradshaw to file any response to the motion to dismiss on or before January 6, 2015.[7] On January 12, 2015, the Court granted Bradshaw an extension of time to respond.[8] On January 30, 2015, Bradshaw filed his response to respondent's motion to dismiss.[9]

---

[1] Docket no. 1 at 7, and attached exhibit A at 1. Bradshaw currently is housed at the Bill Clements Unit in Amarillo, Texas. Id. at 10.

[2] Id. Because Bradshaw is proceeding *pro se*, the Court considers his petition as if it were filed on the date he states he placed it in the prison mailing system for mailing, that is, July 2, 2014. Id. at 10. See Spotville v. Cain, 149 F.3d 374, 378 (5th Cir. 1998) ("mail box rule" applies to *pro se* petitioners in custody).

[3] Docket no. 3.

[4] Docket no. 7.

[5] Docket nos. 11, 12, 13.

[6] Docket no. 16.

[7] Docket no. 17.

[8] Text-only order dated Jan. 12, 2015; docket no. 18.

[9] Docket no. 20.

III. STATEMENT OF THE CASE

Bradshaw's § 2254 petition challenges his 2011 conviction in the 186th Judicial District Court of Bexar County, Texas, of capital murder and his sentence of life imprisonment.[10] The Texas Fourth Court of Appeals affirmed Bradshaw's conviction on May 9, 2012.[11] The Texas Court of Criminal Appeals ("CCA") refused discretionary review on October 3, 2012.[12]

On or about September 17, 2013, Bradshaw filed a state habeas corpus application, which the CCA dismissed for failure to comply with procedural rules on January 8, 2014.[13] On or about February 21, 2014, Bradshaw filed his second state habeas petition, which the CCA denied without written order on June 6, 2014.[14] On or about July 2, 2014, Bradshaw filed his petition in this Court.[15]

The Texas Fourth Court of Appeals described the evidence against Bradshaw as follows:

> On October 16, 2009, James Holmes, the victim, checked into a motel. He met Larry Mitchell, another resident of the motel. Holmes was seeking to purchase crack cocaine from Mitchell. Mitchell and his girlfriend, Tonya Moody, left the motel in Mitchell's vehicle and picked up two other men, Charlton

---

[10] Docket no. 1 at 7, exhibit A at 1; docket no. 2 at 1 (citing "State v. Benitez, No. 2004-CR-2488 (Tex. 144th Jud. Dist. Ct., jmt. entered Feb. 8, 2005)").

[11] Bradshaw v. Texas, Case No. 04-11-00173-CR, 2012 WL 1648218 (Tex. App.—San Antonio 2012, pet. ref'd).

[12] Bradshaw v. Texas, No. PD-0665-12. The records from these proceedings are contained in the three volumes of state court records ("SHCR") submitted to the Court on October 10, 2014. Docket no. 12. Citations to the SHCR in this report include the SHCR volume number and page number, when available.

[13] SHCR-01 at 34-37 and "Action Taken" page.

[14] SHCR at 16-17 and "Action Taken" page.

[15] Docket no. 1.

> Bradshaw and Calvin Massengale, who provided the cocaine. While traveling back to the motel, the group discussed robbing Holmes after supplying him with the cocaine.
>
> Mitchell delivered the drugs to Holmes's room and noticed that Holmes was using a knife to cut the cocaine. Mitchell returned to his own room and saw Bradshaw place an ashtray in a rag or sock. Mitchell believed this was something to be used as a weapon in the robbery. Later, Moody went up to Holmes's room alone. Massengale and Bradshaw arrived shortly thereafter. When Mitchell joined the others in Holmes's room, he found Bradshaw holding Holmes's knife and Holmes yelling that he was being robbed. Mitchell and Moody fled to Mitchell's vehicle; Bradshaw and Massengale followed shortly behind. Holmes chased after Bradshaw and Massengale and screamed, "Stop them, they robbed me;" he collapsed on the sidewalk. Later that evening, Bradshaw told a friend that he had stabbed a man. Two other people overheard the conversation.
>
> Three days later Bradshaw was arrested and charged with the capital murder of Holmes. He pleaded not guilty, and a jury trial was held. A forensic pathologist testified that Holmes died from a stab wound to his left chest that cut the edge of his left lung and pierced his heart. Mitchell testified that he saw Bradshaw holding a knife after Bradshaw robbed Holmes. The two witnesses that overheard Bradshaw's account of the stabbing also testified at trial.[16]

Bradshaw's petition[17] and 26-page memorandum in support[18] list 25 grounds for relief, including challenges to his right to a public trial, his right to a "fair appeal," ten claims of ineffective assistance of trial counsel, five claims of prosecutorial misconduct, three claims of ineffective assistance of appellate counsel, two claims of "fundamental miscarriage of justice," one claim of actual innocence, and two claims of failure to prove an element of the offense of capital murder/insufficient evidence.[19] Bradshaw's claims are identical to the claims he raised in

---

[16] Bradshaw v. State, 2012 WL 1648218, at *1.

[17] Docket no. 1.

[18] Docket no. 7.

[19] Docket no. 1 at 1-12; docket no. 7 at 1-19.

his state habeas application[20] and appear to be fully exhausted and not procedurally barred,

---

[20] Respondent states he "understands Bradshaw to allege the following grounds for relief:

1. The trial court violated his right to a public trial by excluding his family and the public from the courtroom during jury selection due to overcrowding;

2. The intermediate appellate court erred by using evidence not supported by the record to find there was sufficient evidence of guilt;

3. His trial attorney rendered ineffective assistance by failing to object to the exclusion of family and the public during jury selection;

4. His trial attorney rendered ineffective assistance by failing to the prosecution's inappropriate behavior;

5. His trial attorney rendered ineffective assistance by failing to contact and interview Juan Herrera;

6. His trial attorney rendered ineffective assistance by failing to contact and interview Calvin Beard;

7. His trial attorney rendered ineffective assistance by failing to present exculpatory evidence;

8. His trial attorney rendered ineffective assistance by failing to impeach witness Tiffany Barnett;

9. His trial attorney rendered ineffective assistance by failing to file a motion for new trial;

10. His trial attorney rendered ineffective assistance by failing to interview alibi witnesses;

11. The prosecution committed perjury;

12. The prosecution erred by misstating the law;

13. The prosecution erred by vouching for a witness;

14. The prosecution used inflammatory, misleading, and inadmissible evidence;

15. The prosecution erred by failing to investigate inconsistencies in the testimony and presenting perjured testimony;

16. His trial attorney rendered ineffective assistance by failing to properly object and preserve error;

17. The cumulative effect of trial counsel's errors constitutes ineffective assistance;

18. Appellate counsel rendered ineffective assistance by failing to challenge the sufficiency of the evidence to prove murder;

19. Appellate counsel denied him his right to another attorney;

20. Appellate counsel rendered ineffective assistance by failing to challenge the sufficiency of the evidence to prove murder;

21. His conviction is a fundamental miscarriage of justice;

22. He is actually innocent of capital murder;

23. His conviction is a miscarriage of justice because it rests on uncorroborated accomplice testimony;

although respondent reserves the exhaustion and procedural default defenses in the event the Court disagrees with respondent's position that Bradshaw's petition is time-barred.[21] Respondent "does not contend that the petition is successive under 28 U.S.C. § 2244(b)."[22]

IV. ISSUE

Whether Bradshaw's § 2254 habeas corpus petition should be dismissed as time-barred pursuant to 28 U.S.C. § 2244(d).

V. STANDARD

Federal habeas corpus relief is available only where the petitioner demonstrates he is in custody in violation of his constitutional or other federal rights.[23] State law errors that do not implicate constitutional rights are not a basis for habeas corpus relief.[24] Rule 2(d) of the Rules Governing § 2254 Proceedings states the petition "shall set forth in summary form the facts supporting each of the grounds." Conclusory and speculative allegations are not sufficient to entitle a petitioner to a hearing or relief in a § 2254 case.[25]

Section 2254(b)(1)(A) requires the petitioner to exhaust available state court remedies

---

24. The State failed to prove intent; and
25. The evidence was insufficient to prove guilt."

Docket no.16 at 1-3.

[21] Id. at 5 ("Respondent reserves the exhaustion and procedural default defenses if further proceedings are necessary.").

[22] Id. (citing 28 U.S.C. § 2244(b)).

[23] 28 U.S.C. §§ 2241, 2254.

[24] Estelle v. McGuire, 502 U.S. 62, 67, 112 S.Ct. 475, 480 (1991).

[25] West v. Johnson, 92 F.3d 1385, 1398-99 (5th Cir. 1996), cert. denied, 520 U.S. 1242 (1997); Perillo v. Johnson, 79 F.3d 441, 444 (5th Cir. 1996).

before seeking federal habeas corpus relief.[26] Section 2254(d) requires this Court to defer to the state court's reasonable interpretations of federal law and reasonable determinations of fact in light of the evidence presented in the state proceedings.[27] Factual determinations of a state court are "presumed to be correct" and the petitioner has the burden of rebutting this presumption by "clear and convincing evidence."[28]

Title 28 U.S.C. § 2244(d)(1) imposes a one-year statute of limitations on state prisoners filing habeas petitions. Section 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a **properly filed application** for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.[29]

The limitation period became effective April 24, 1996, pursuant to the AEDPA.[30]

---

[26] 28 U.S.C. § 2254(b)(1)(A).

[27] 28 U.S.C. § 2254(d).

[28] 28 U.S.C. § 2254(e)(1).

[29] 28 U.S.C. § 2244(d) (emphasis added).

[30] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

VI. DISCUSSION

A. Summary of Arguments

Respondent moves to dismiss Bradshaw's petition, arguing Bradshaw's petition should be dismissed as untimely. First, respondent argues the statute of limitations on Bradshaw's petition began to run on January 2, 2013, at the conclusion of his direct appeal. Specifically, respondent argues the judgment of conviction became final "by the conclusion of direct review or the expiration of the time for seeking such review"[31] because: (1) the CCA refused Bradshaw's petition for discretionary review ("PDR") on October 3, 2012; (2) Bradshaw had 90 days, or until January 2, 2013, to file a petition for writ of certiorari with the United States Supreme Court; (3) Bradshaw did not file a petition for writ of certiorari; and, therefore, (4) Bradshaw's conviction became final on January 2, 2013.[32] Accordingly, respondent asserts Bradshaw's statute of limitations expired on January 2, 2014, if his limitations period was not subject to tolling.[33]

Second, respondent argues that Bradshaw's state habeas applications did not toll the limitations period pursuant to § 2244(d)(2).[34] Specifically, respondent argues that Bradshaw's first state habeas application was dismissed by the CCA for failure to comply with state procedural filing requirements, and a state application not in compliance with procedural filing

---

[31] Docket no. 16 at 6 (quoting 28 U.S.C. § 2244(d)(1)(A)).

[32] Id. at 7 (citing "Bradshaw v. State, No. PD-0665-12" and Sup. Ct. R. 13.1).

[33] Id.

[34] 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State postconviction 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.").

requirements does not toll the limitations period.[35] Respondent argues Bradshaw's second state habeas application did not toll the limitations period because it was filed on February 2, 2014, after the limitations period expired.[36] Therefore, respondent argues no tolling applies and Bradshaw's § 2254 petition, filed July 2, 2014, is time-barred.[37]

Third, respondent argues that Bradshaw is not entitled to equitable tolling because he has not alleged any facts that would support a finding equitable tolling applies.[38] Respondent argues equitable tolling is available only in "rare and exceptional circumstances" and Bradshaw has not demonstrated that any delay in filing his federal petition was a result of anything more than "mere attorney error or neglect."[39] Respondent asserts equitable tolling does not apply to litigants who are not diligent in pursuing their rights, and, as Bradshaw waited almost nine months after his conviction became final to file his state habeas corpus application, "it cannot be said Bradshaw was diligent in pursuing relief."[40] Respondent argues Bradshaw is not entitled to any tolling of the limitations period under § 2244(d)(1)(B) because the record does not show any unconstitutional state action impeded Bradshaw from filing his petition earlier or his claims concern a newly-recognized constitutional right made retroactive to cases on collateral review by the Supreme Court. Further, respondent argues Bradshaw is not eligible for the equitable

---

[35] Docket no. 16 at 7.

[36] Id. at 8.

[37] Id.

[38] Id. at 8-9.

[39] Id. (citations omitted).

[40] Id. at 9 (citations omitted).

exception to time-barred claims "where a petitioner may demonstrate his actual innocence."[41] Citing Schlup v. Delo, respondent argues the equitable exception does not apply because Bradshaw "has not demonstrated that it is more likely than not that no reasonable juror would have convicted him."[42] Respondent requests that the Court dismiss Bradshaw's petition with prejudice, and refuse to issue a certificate of appealability.[43]

In response, Bradshaw raises four main arguments in support of his petition.[44] First, Bradshaw argues his first state habeas application was properly filed, and therefore, should have tolled the statute of limitations for his federal petition.[45] Specifically, Bradshaw asserts his first state habeas application did not violate the Texas Rules of Appellate Procedure because he did not submit multiple grounds for relief on the same page, rather each claim listed supported the sole ground of ineffective assistance of counsel.[46] Second, Bradshaw argues equitable tolling applies because he diligently pursued his rights and extraordinary circumstances prevented timely filing.[47] Specifically, Bradshaw argues he "wasted 119 days" waiting for a ruling from the CCA on his motion for rehearing of the denial of his PDR.[48] Further, Bradshaw argues his legal

---

[41] Id.

[42] Id. at 10 (citing Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995)).

[43] Id.

[44] Docket no. 20.

[45] Id. at 1.

[46] Id. at 6.

[47] Id. at 1.

[48] Id. at 5.

paperwork was confiscated "[f]rom July 15 to July 25, 2013," while Bradshaw was in segregation, and that, upon release from segregation, some of his legal paperwork was missing until November 5, 2013; therefore, Bradshaw had to submit his first state habeas application in September 2013 "using the little notes he had."[49] Third, Bradshaw argues the Schlup exception applies because he is actually innocent.[50] In support, Bradshaw relies on notes from his trial counsel, completed after interviewing jurors following the trial, which state "[j]urors believed all witnesses" and

> Jurors could not agree on who actually did the stabbing. They finally—and correctly—concluded that it did not matter under the law of parties who did the stabbing. If both Massengale and Bradshaw participated, both were guilty under the law.[51]

Fourth, Bradshaw argues that failing to review the merits of his claims will result in a fundamental miscarriage of justice.[52] Plaintiff attaches five exhibits in support of his petition.[53]

B. Limitations

The question presented by the motion to dismiss this petition is whether Bradshaw's petition was timely filed with this Court. The following dates are undisputed and important:

May 9, 2012:	Bradshaw's conviction and sentence are affirmed by Texas Fourth Court of Appeals
October 3, 2012:	CCA denies Bradshaw's PDR

---

[49] Id. at 7-8 (citing Valverde v. Stinson, 224 F.3d 129, 133 (2nd Cir. 2000)).

[50] Id. at 9.

[51] Id., exhibit D.

[52] Id. at 11.

[53] Id., attached exhibits.

January 2, 2013:	Bradshaw's time for filing a petition for certiorari in the United States Supreme Court expires (*i.e.*, ninety days after PDR denied)
September 17, 2013:	Bradshaw files his first state habeas application (258 days had run under the federal statute at this point with 107 days remaining)
January 8, 2014:	CCA dismisses Bradshaw's first state habeas application for failure to comply with procedural rules
February 21, 2014:	Bradshaw files his second state habeas application (50 days after the federal limitations period ended)
June 18, 2014:	CCA denies Bradshaw's second state habeas application
July 2, 2014:	Bradshaw files his federal habeas petition.[54]

Bradshaw's judgment became final on January 2, 2013, ninety days after the CCA refused his PDR.[55] Bradshaw was required to file his federal petition in this Court on or before January 2, 2014, but Bradshaw did not file his motion until approximately six months later. Thus, absent any ground for statutory or equitable tolling, Bradshaw's petition is time-barred.

With respect to statutory tolling, respondent argues that Bradshaw's state habeas applications did not toll the limitations period for the federal habeas application. Under 28 U.S.C. § 2244(d)(2), the time for filing federal habeas applications is only tolled during the period of time in which a properly filed state post-conviction attack is "pending."[56] Bradshaw's

---

[54] Docket no. 1 at 3, 4, 10.

[55] 28 U.S.C. § 2244(d)(1)(A). Foreman v. Dretke, 383 F.3d 336, 340 (5th Cir. 2004) (judgment becomes final when Supreme Court rejects petition for certiorari, or ninety days after the entry of judgment by the highest state court); Roberts v. Cockrell, 319 F.3d 690, 694 (5th Cir. 2003) (same).

[56] 28 U.S.C. § 2244 (d)(2).

time for filing could only be tolled if he had a pending post conviction attack. A state habeas petition dismissed on procedural grounds is not "properly filed" within the purview of § 2244(d)(1)(D), and does not toll the limitations period.[57] Because Bradshaw's first state habeas application did not comply with state procedural filing requirements, his time for filing his federal habeas petition was not tolled. Further, the Fifth Circuit has held that a state habeas application filed after the limitations period expires does not toll the time for filing a federal habeas application.[58] Bradshaw's second state habeas application, filed on February 21, 2014, did not toll the time for filing because it was filed after the limitations period expired. Neither of Bradshaw's two state post-conviction attacks were pending when he filed his federal habeas application. Thus, Bradshaw's time for filing a federal habeas application was not tolled, and his federal application is untimely as the limitations period expired on January 2, 2014. Therefore, the record does not show Bradshaw is entitled to statutory tolling.

With respect to equitable tolling, the United States Supreme Court has held that the AEDPA statute of limitations is subject to equitable tolling when a petitioner demonstrates: "(1) that he has been pursuing his rights diligently, and (2) some extraordinary circumstance

---

[57] 28 U.S.C. § 2244(d)(1)(D); Artuz v. Bennett, 531 U. S. 4, 8, 121 S.Ct. 361, 363-64 (2000) ("[A]n application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings."); Wickware v. Thaler, 404 Fed. App'x. 856, 858–59 (5th Cir. 2010) ("[N]either an improperly filed state habeas petition nor a state habeas petition filed outside the limitations period has any effect on the one-year time-bar."). See also Davis v. Quarterman, 342 Fed. App'x 952, 953 (5th Cir. 2009); Larry v. Dretke, 361 F.3d 890, 893-98 (5th Cir.), cert. denied, 543 U.S. 893, 125 S.Ct. 141 (2004).

[58] Scott v. Johnson, 227 F.3d 260, 262 (5th Cir. 2000), cert.denied, 532 U.S. 963, 121 S. Ct. 1498 2001) ("state habeas application did not toll the limitations period under § 2244(d)(2) because it was not filed until after the period of limitation had expired").

stood in his way and prevented timely filing."[59] The United States Court of Appeals for the Fifth Circuit has explained, "[t]he doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable,"[60] but is applied only in rare and exceptional circumstances.[61] Equitable tolling applies principally when the respondent actively misled a petitioner about the cause of action or the petitioner was prevented in some extraordinary way from timely asserting his rights.[62] "[I]gnorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing."[63] A claim of actual innocence does not excuse a late petition and does not warrant equitable tolling of the limitations period;[64] nor does a claim that the state's procedural defaults resulted in a miscarriage of justice toll the statute of limitations.[65]

Bradshaw has not demonstrated a proper ground to apply equitable tolling. Unlike

---

[59] Holland v. Florida, 560 U.S.631, 649, 130 S.Ct. 2549, 2562 (2010). See also Lawrence v. Florida, 549 U.S. 327, 336, 127 S.Ct. 1079, 1085 (2007); Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S.Ct. 1807 (2005).

[60] Davis v. Johnson, 158 F.3d 806, 810 (5th Cir. 1998), cert. denied, 526 U.S. 1074, 119 S.Ct 1474 (1999).

[61] Larry v. Dretke, 361 F.3d at 896–97.

[62] Phillips v. Donnelly, 216 F.3d 508, 510–11 (5th Cir. 2000); United States v. Patterson, 211 F.3d 927, 930 (5th Cir. 2000).

[63] Fisher v. Johnson, 174 F.3d 710, 714 (5th Cir. 1999), cert. denied, 531 U.S. 1164, 121 S.Ct. 1124 (2001).

[64] Cousins v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002), cert. denied, 539 U.S. 918, 123 S.Ct. 2277 (2003).

[65] Jaramillo v. Thaler, No. SA-10-CA-774-XR, 2011 WL 3357683, at *3 (W.D. Tex. Aug 3, 2011) (citing Fierro v. Cockrell, 294 F.3d 674, 683 n.17 (5th Cir. 2002), cert. denied, 538 U.S. 947, 123 S.Ct. 1621 (2003)).

Wickware v. Thaler, a case in which the Fifth Circuit suggested equitable tolling may be warranted when the CCA has delayed the decision to dismiss a state habeas due to noncompliance,[66] Bradshaw cannot show he diligently pursued federal habeas relief. Bradshaw waited approximately eleven months before filing his first state habeas application. Unlike Wickware, in which the Fifth Circuit declined to apply equitable tolling when the court's rejection of a prisoner's state habeas as noncompliant was entered nine months after the state habeas was filed,[67] the CCA rejected Bradshaw's first habeas application after approximately four months. Although any delay by any court at any time is regrettable, the delay is significantly less than what was at issue in Wickware.

Bradshaw also notes he was in segregation from July 15-25, 2013, and his legal paperwork confiscated which prevented him from preparing his petition. But, a temporary inability to access legal paperwork or the law library may not be sufficient to demonstrate "extraordinary circumstances."[68] Further, Bradshaw admits his legal documents were returned in full on or before November 5, 2013, nearly two full months before the statute of limitations expired on his federal habeas petition. In any event, Bradshaw's petition was six months late. Therefore, the record does not show Bradshaw is entitled to equitable tolling.

---

[66] 404 Fed. App'x. at 861.

[67] Id.

[68] See Ramos-Martinez v. United States, 638 F.3d 315, 324 (1st Cir. 2011) (holding isolation due to a lock-down is "insufficient to excuse a failure to file a timely habeas petition"); Manning v. Henry, 2 Fed. Appx. 898, 900 (9th Cir. 2001) ("It is undisputed that the lock[-]downs were beyond Petitioner's control. However, they were not 'extraordinary circumstances' that made it 'impossible' for Petitioner to file his petition in a timely manner."); United States v. Roach, 520 Fed. Appx. 656, 658 (10th Cir. 2013) ("[T]he temporary prison lock-down . . . do[es] not qualify as extraordinary circumstances.").

Bradshaw further argues he "wasted 119 days" waiting for the CCA to rule on his motion for rehearing following the denial of his PDR. Bradshaw's argument impacts the date of finality of his conviction and statutory tolling. The state court records do not contain any documentation on Bradshaw's motion for rehearing.[69] But, the docket sheets on Bradshaw's PDR—pulled from the CCA's website and filed as supplemental state court records— show that on February 11, 2013, the CCA received Bradshaw's motion for rehearing and summarily disposed of it as untimely.[70] Bradshaw has submitted documentation purporting to show he mailed his motion for rehearing on October 15, 2012,[71] within the fifteen-day time period to move for rehearing on a PDR.[72] Assuming Bradshaw's motion for rehearing was pending before the CCA for 119 days—until February 11, 2013—and the statute of limitations tolled during the pendency, Bradshaw's judgment of conviction became final 90 days after the CCA denied his motion for rehearing, or May 13, 2013.[73] Under this analysis, Bradshaw's limitations period expired one year later, on May 13, 2014. Bradshaw did not file his federal petition until July 2, 2014, nearly two months after the limitations period expired if the statute of limitations was tolled during the

---

[69] See generally docket nos. 11, 12, 13.

[70] See docket no. 21, supplemental state court records.

[71] Docket no. 19, exhibit 1; docket no. 20, exhibit A.

[72] TEX. R. APP. P. 79.1 ("A motion for rehearing may be filed with the Court of Criminal Appeals clerk within 15 days from the date of the judgment or order."). See also TEX. R. APP. P. 79.2(c) ("A motion for rehearing an order that refuses a petition for discretionary review may be grounded only on substantial intervening circumstances or on other significant circumstances which are specified in the motion.").

[73] See Roberts, 319 F.3d at 694 (under Supreme Court rules, a party has ninety days to file for certiorari after entry of the state court's order denying discretionary review).

pendency of his motion for rehearing before the CCA.[74] Therefore, even if the limitations period were tolled during the pendency of his motion for rehearing, Bradshaw's federal petition is untimely.

With respect to the equitable exception under Schlup, petitioners asserting actual innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[75] The Schlup standard is demanding, permitting review only in the "extraordinary" case.[76] Bradshaw has not demonstrated that more likely than not, in light of the newly submitted evidence, no reasonable juror would find him guilty beyond a reasonable doubt. In fact, the newly submitted evidence on which Bradshaw relies—including his trial counsel's notes—make it clear that a reasonable juror could have found Bradshaw guilty beyond a reasonable doubt under the Texas law of parties.[77] Therefore, Bradshaw has not demonstrated the exception announced in Schlup applies to permit review of his time-barred claims, and has made no showing that a failure to address the merits of his claims would result in a miscarriage of justice. In sum, Bradshaw filed his petition in this Court after the expirations period and has not demonstrated any statutory or equitable tolling. Accordingly, respondent's motion to dismiss should be **granted** and Bradshaw's petition should be **dismissed**.

---

[74] See England v. Quarterman, 242 Fed. App'x 155, 158 (5th Cir. 2007) (non-complying motion for rehearing does not suspend finality of state court judgment).

[75] Schlup, 513 U.S. at 327, 115 S.Ct. at 867.

[76] Id.

[77] See docket no. 20, exhibit D.

C. Hearing

A habeas corpus petitioner is not entitled to relief or a hearing on his claims when the petitioner fails to allege a basis for relief, offers "conclusory allegations unsupported by specifics, contentions that in the face of the record are wholly incredible,"[78] or seeks relief based on allegations that can be resolved on the record.[79] Petitioner is not entitled to a hearing on his petition because his claims are either conclusory, refuted by the record, barred by limitations, or are precluded by prevailing legal standards.

VII. CERTIFICATE OF APPEALABILITY

To appeal the denial of a habeas corpus petition filed under § 2254, a petitioner must obtain a certificate of appealability ("COA"). A COA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which COA is granted alone.[80] Federal Rule of Appellate Procedure 22 provides that a certificate of appealability to appeal the denial of a habeas corpus petition shall be granted only upon "a substantial showing of the denial of a federal right."[81] To make "a substantial showing of the denial of a federal right," an applicant must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were

---

[78] Perillo, 79 F. 3d at 444.

[79] Lawrence v. Lensing, 42 F. 3d 255, 258-59 (5th Cir. 1994).

[80] See Murphy v. Johnson, 110 F.3d 10, 11 n.1 (5th Cir. 1997); 28 U.S.C. §2253(c)(3).

[81] FED. R. APP. P. 22.

'adequate to deserve encouragement to proceed further.'"[82] To challenge successfully on appeal a court's dismissal of claims for a reason not of constitutional dimension (such as procedural default, limitations, or lack of exhaustion), the petitioner 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 whether the lower court was correct in its procedural ruling.[83] The District Court is authorized to address the propriety of granting a COA *sua sponte*.[84]

After thoroughly reviewing the record and applicable law, this Court determines reasonable jurists would agree Bradshaw's claims for habeas relief do not satisfy the standard for obtaining a COA. Bradshaw has failed to make a substantial showing of the denial of a federal right or demonstrate that reasonable jurists could debate whether his petition should be resolved in a different manner. Accordingly, Bradshaw should be denied the issuance of a COA.

VIII. RECOMMENDATIONS

Based on the foregoing discussion, it is recommended that:

! respondent's motion[85] to dismiss be **GRANTED**;

! Bradshaw's petition for issuance of a writ of habeas corpus[86] be **DENIED**;

---

[82] Slack v. McDaniel, 529 U.S. 473, 482, 120 S. Ct. 1595, 1603 (2000) (citing Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383, 3395 (1983)).

[83] Slack, 529 U.S. at 484, 120 S. Ct. at 1604 (when court denies habeas claim on procedural grounds, without reaching underlying constitutional claim, COA may issue only when petitioner shows reasonable jurists would find it debatable whether (1) claim is valid assertion of denial of a constitutional right and (2) the district court's procedural ruling was correct).

[84] Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000).

[85] Docket no. 16.

[86] Docket no. 1.

- Bradshaw's implicit request for issuance of a certificate of appealability be **DENIED**;
- any other pending motions or requests for relief be **DENIED**; and
- this case be **DISMISSED**.

If the District Judge accepts the recommendations in this report, the Clerk's Office can be directed to enter judgment in this case.

IX. INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT/APPEAL

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either: (1) electronic transmittal to all parties represented by an attorney registered as a Filing User with the Clerk of Court pursuant to the Court's Procedural Rules for Electronic Filing in Civil and Criminal Cases; or (2) by certified mail, return receipt requested, to any party not represented by an attorney registered as a Filing User.

As provided in 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b), any party who desires to object to this Report must **file** with the District Clerk and **serve** on all parties and the Magistrate Judge written Objections to the Report and Recommendation within **14 days** after being served with a copy, unless this time period is modified by the District Court. A party filing Objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections.

Failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report will bar the party from receiving a de novo

determination by the District Court.[87] A party's failure to file timely written objections to this Recommendation will bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.[88]

ORDERED, SIGNED and ENTERED this 6th day of February, 2015.

Pamela A. Mathy

PAMELA A. MATHY
UNITED STATES MAGISTRATE JUDGE

---

[87] See Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 472 (1985).

[88] Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000); Douglass v. United Serv. Auto. Ass'n., 79 F.3d 1415, 1428 (5th Cir. 1996).