

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

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No. 17-40908

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STEVEN MADINA ESPARZA,

Petitioner-Appellant

v.

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

Respondent-Appellee

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

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**O R D E R:**

Steven Madina Esparza, Texas prisoner # 1705049, moves for a certificate of appealability (COA) to appeal the district court's decision dismissing as untimely his 28 U.S.C. § 2254 petition challenging his conviction for possession of a controlled substance, cocaine in the amount of four to 200 grams, with intent to deliver in a drug-free zone. He argues that the following issues are debatable: whether a procedural defect was caused by the State or his appellate counsel; whether he is entitled to equitable tolling of the limitations period; and whether the State should be judicially estopped from asserting the timeliness issue. In addition, he asserts that he is entitled to equitable tolling of the limitations period based on his counsel's ineffective assistance in failing to file a timely petition for discretionary review; that his

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counsel's error was the cause of his procedural default, relying on *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013); and that a miscarriage of justice will result if he is blamed for these events.

To obtain a COA, Esparza must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When a district court rejects a claim on procedural grounds, this court will issue a COA only if the movant "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Esparza has not made the required showing concerning the above issues. Accordingly, his COA motion is DENIED. His motion for leave to proceed in forma pauperis on appeal is also DENIED.

/s/Jennifer Walker Elrod

JENNIFER WALKER ELROD  
UNITED STATES CIRCUIT JUDGE

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

STEVEN MADINA ESPARZA

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v.

CIVIL ACTION NO. 4:14CV694

WILLIAM STEPHENS,  
DIRECTOR, TDCJ-CID

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ORDER ADOPTING REPORT AND RECOMMENDATION OF THE  
UNITED STATES MAGISTRATE JUDGE

The Report and Recommendation of the Magistrate Judge (the “Report”) (Dkt. 12), which contains her findings, conclusions, and recommendation for the disposition of Esparza’s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Dkt. 1), has been presented for consideration. The Report recommends that the Petition be dismissed with prejudice as time barred. Esparza has filed written objections (Dkt. 14). Having made a *de novo* review of the objections, the court concludes that the findings, conclusions, and recommendation of the Magistrate Judge are correct.

**I. Finality of Conviction Under AEDPA**

Esparza first objects to the Magistrate Judge’s conclusion that his conviction became final under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) on September 14, 2012, the date his petition for discretionary review (“PDR”) was due to be filed with the Texas Criminal Court of Appeals (“CCA”). *See* Dkt. 14 at 1-3. Esparza does not challenge the Magistrate Judge’s conclusion that his conviction became final when his options for direct review were exhausted. *See id.* at 3. He also agrees that his state petition for discretionary review (“PDR”) was due on September 14, 2012. *See id.* at 3. He contends that, since he filed a state PDR, he could have sought Supreme Court

review of the CCA's order dismissing his PDR as untimely or the CCA's subsequent order denying his motion for rehearing. Thus, he disagrees with the Magistrate Judge's conclusion that neither order was a ruling on the merits subject to Supreme Court review. *See id.* at 1, 3-4. He further argues his conviction was not final until January 9, 2013, the date of the CCA's denial of his motion for rehearing. *See id.* at 3-4.

"For petitioners who pursue direct review all the way to [the Supreme] Court, the judgment becomes final at the 'conclusion of direct review'—when [the Supreme] Court affirms a conviction on the merits or denies a petition for certiorari. For all other petitioners, the judgment becomes final at the 'expiration of the time for seeking such review'—when the time for pursuing direct review in [the Supreme] Court, or in state court, expires." *Gonzalez v. Thaler*, 565 U.S. 134, 132 S. Ct. 641, 653–54 (2012); *see also United States v. Gamble*, 208 F.3d 536, 537 (5th Cir. 2000); *United States v. Thomas*, 203 F.3d 350, 352 (5th Cir. 2000). Under Supreme Court Rule 13, a petitioner may seek Supreme Court review of a judgment *on the merits* by the highest court of a state. *See SUP.CT. R. 13.1; see also Thaler*, 132 S. Ct. at 656. The CCA's refusal of a PDR as untimely filed is not a ruling on the merits subject to Supreme Court review. *See Murph v. Director, TDCJ-CID*, No. 6:09CV50, 2010 WL 4342012, at \*4-5 (E.D. Tex. Sept. 23, 2010), *report and recommendation adopted*, No. 6:09CV50, 2010 WL 4342034 (E.D. Tex. Nov. 1, 2010); *Bautista v. Dretke*, 3:04-CV-0751-P, 2004 WL 2049301, at \*3 (N.D. Tex. Sept. 13, 2004), *report and recommendation adopted*, 3:04-CV-751-P, 2004 WL 2534234 (N.D. Tex. Nov. 4, 2004); *Williams v. Cockrell*, No. 3-02-CV-331-M, 2003 WL 21528765, at \*2 (N.D. Tex. July 2, 2003). If a defendant is convicted in a Texas state court and, thereafter, fails to timely file a PDR in the CCA, his conviction is final for purposes of the AEDPA on the date the PDR was due. *See e.g., Bautista*, 2004 WL 2049301, at \*3; *Williams*, 2003 WL 21528765, at \*2.

There is no dispute that the CCA dismissed Esparza's PDR as untimely filed on November 27, 2012. *See* Dkt. 7-1 at 3. This ruling was not a decision on the merits subject to Supreme Court review. The CCA's order denying rehearing, likewise, did not reach the merits of the claims asserted in Esparza's PDR; accordingly, the order was not subject to Supreme Court review. Because Esparza's failure to timely file a state PDR foreclosed his options for direct review of the state court judgment, his conviction became final when the PDR was due, September 24, 2012. The Magistrate Judge's finding that Esparza's conviction became final on that date is correct.

Next, Esparza objects to the Magistrate Judge's citation of *Bautista v. Dretke*. *See* Dkt. 14 at 2. In *Bautista*, the United States District Court for the Northern District of Texas determined that the CCA's order dismissing a PDR as untimely was not a ruling on the merits subject to Supreme Court review. *Bautista*, 2004 WL 2019301, at \*3. The Northern District further noted that "gratuitously adding ninety days for finality of judgment is . . . improper when a PDR is refused as untimely filed." *Id.*

Esparza attempts to distinguish the case, noting that in *Bautista*, the *pro se* petitioner was solely responsible for the delayed filing of a state PDR. *See* Dkt. 14 at 2. Esparza, in contrast, attributes the delay in filing his own PDR to his appellate counsel. *See id.* However, Esparza's relative culpability has no bearing on when his conviction became final under the AEDPA.<sup>1</sup> Esparza's objection to the Magistrate Judge's reliance on *Bautista* is, thus, without merit.

Esparza further objects to the Magistrate Judge's finding that his state PDR was filed on October 5, 2012. *See id.* at 3. He argues that the PDR should be deemed filed on September 28, 2012, the date it was delivered to the United States Postal Service for mailing. *See id.* This

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<sup>1</sup>As discussed *infra*., Esparza's culpability factors in the court's determination of whether he is entitled to equitable tolling of the statute of limitations.

argument is of little consequence, as Esparza concedes his PDR was due on September 14, 2012, two (2) weeks before the mailing date. *See id.*

Additionally, the argument lacks merit. Under Texas law, the pleadings of *pro se* inmates are deemed filed at the time they are delivered to prison authorities, not at the time they are stamped by the clerk of the court. *See Richards v. Thaler*, 710 F.3d 573, 578–79 (5th Cir. 2013). The so-called “prison mailbox rule” does not apply, however, when inmate litigants are represented by counsel. As Esparza emphatically notes in his objections, he was represented by counsel during the state appellate proceedings. The record further indicates that Esparza’s appellate counsel drafted his PDR and delivered it to the United States Postal Service for mailing. *See* Dkt. 6-4 at 1, 17. Accordingly, the prison mailbox rule is inapplicable.<sup>2</sup>

## **II. Statutory Tolling**

Esparza objects to the Magistrate Judge’s conclusion that his November 10, 2013, state writ application did not toll the statute of limitations pursuant to 28 U.S.C. § 2244(d)(2) because it was filed after the limitations period expired. *See* Dkt. 14 at 4. Under § 2244(d)(2), AEDPA’s one year statute of limitations is automatically tolled for “the time in which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” However, state habeas applications must be filed before expiration of the limitations period in order to toll AEDPA’s limitations period. *See Richards*, 710 F.3d at 576.

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<sup>2</sup> Esparza further notes that his PDR was stamped “received” by the CCA on October 1, 2012, and “filed” by the CCA on October 5, 2012. Even assuming that October 1, 2012, is the proper filing date, the court agrees with the Magistrate Judge’s conclusions that (1) Esparza’s PDR was untimely filed; (2) this untimely filing foreclosed the option of Supreme Court review of the judgment of conviction; and (3) Esparza’s conviction became final for purposes of the AEDPA’s statute of limitations on the date the PDR was due on September 14, 2012.

Esparza argues that his conviction became final and the statute of limitations began to run on April 9, 2013, ninety (90) days after the CCA denied his motion for rehearing and, according to him, the date his time for seeking certiorari in the Supreme Court expired. *See* Dkt. 14 at 3-4. Thus, he contends his filing of a state writ application two hundred and fifteen (215) days later, tolled the statute of limitations. However, for the reasons discussed in the previous section, Esparza misstates the date his conviction became final.

The Magistrate Judge properly concluded that Esparza's conviction became final on September 14, 2012, the date his state PDR was due under Texas law. The one year limitations period under AEDPA began to run the next day, September 15, 2012, and expired on Monday, September 16, 2013. *See Flanagan v. Johnson*, 154 F.3d 196, 202 (5th Cir. 1998); FED. R. CIV. P. 6(a). Thus, the Magistrate Judge correctly concluded that Esparza's November 10, 2013, state habeas application did not toll the statute of limitations period because it was filed after the limitations period expired.

### **III. Equitable Tolling**

Esparza also raises several objections to the Magistrate Judge's conclusion that he failed to demonstrate a basis for equitable tolling of the limitations period. *See* Dkt. 14 at 4-8. These objections lack merit.

First, Esparza objects to the Magistrate Judge's finding that:

Petitioner argues he is entitled to equitable tolling because his appellate counsel inexcusably neglected to file a state PDR or request an extension of time before the filing deadline passed. He argues his attorney's unprofessional conduct prevented him from timely filing his federal petition. *See* Dkt. 9 at 10. However, he fails to explain how counsel's alleged misfeasance in filing the PDR prevented [Esparza] from filing his . . . federal petition for nearly two (2) years after the CCA dismissed the PDR as untimely.

Dkt. 14 at 4 (quoting Dkt. 12 at 5). He further objects to the Magistrate Judge's conclusion that he failed to pursue his rights diligently. *See id.* at 6. However, as the Magistrate Judge observed, the record establishes:

As of January 9, 2013, the CCA had dismissed Petitioner's PDR as untimely filed and denied his motion for rehearing. Yet, Petitioner waited until November 10, 2013, over three hundred (300) days later, to file a state habeas application. Following the denial of his state habeas application, Petitioner waited an additional one hundred and thirty (130) days to file his federal petition.

Dkt. 12 at 6; *see also* Dkt. 1, 3-5, 3-6, 6-2, 7-1. Esparza argues his appellate counsel is to blame for the delayed filing of his state PDR and state writ application. However, Esparza concedes that he was not represented by counsel for at least some portion of the one hundred and thirty (130) days between the CCA's denial of his state writ application and his commencement of the instant proceedings. *See* Dkt. 9 at 11. He also concedes that he retained a different attorney to represent him in the instant federal habeas proceeding. *See* Dkt. 14 at 6. Thus, the delay in filing Esparza's federal petition cannot be attributed solely to his appellate counsel. Esparza offers no other explanation for the delay. Given Esparza's failure to fully explain his delay in pursuing federal habeas relief, the Court agrees with the Magistrate Judge's finding that he did not diligently pursue his rights.

Next, Esparza challenges the Magistrate Judge's conclusion that "[b]ecause [appellate] counsel's alleged conduct before the PDR was due occurred before Petitioner's conviction was final, it does not warrant equitable tolling of the statute of limitations." Dkt. 14 at 5 (quoting Dkt. 12 at 6). As discussed previously, Esparza's conviction was not final until the deadline for filing his state PDR. Thus, the Magistrate Judge correctly noted that counsel's conduct leading up to the filing deadline provided no basis for equitable tolling. *See Bautista*, 2004 WL 2049301 at \*2 (explaining that equitable tolling has no application before a conviction becomes final).

Esparza argues he is entitled to equitable tolling based on his counsel's conduct during the approximately three weeks between the filing deadline and the date his PDR was actually filed. *See* Dkt. 14 at 5. However, Esparza filed his federal habeas petition on November 2, 2014, more than a year after the applicable limitations period expired. *See* Dkt. 1. Tolling of the statute of limitations for a mere three weeks would not save his petition.

Next, Esparza objects to the Magistrate Judge's conclusion that he is not entitled to equitable tolling because:

Petitioner makes no specific factual allegations in support of his argument that his indigence and status as a *pro se*, inmate litigant prevented him from filing a federal petition for nearly two (2) years after his conviction became final. Without some showing of extraordinary circumstances, these factors are insufficient to warrant equitable tolling of the statute of limitations. . . .

Dkt. 14 at 5 (quoting Dkt. 12 at 6). This objection lacks merit.

In his reply, Esparza argued his "status as an incarcerated prisoner with limited resources at his disposal is a fundamental disadvantage that warrants equitable tolling." Dkt. 9 at 11. He further argued the court should consider his inability to "to retain counsel of choice to replace [appellate counsel]" when assessing whether he was entitled to equitable tolling. *See id.* But Esparza fails to articulate how his indigence, status as an inmate, or purported inability to promptly retain replacement counsel prevented him from timely filing his federal petition.<sup>3</sup> Moreover, these factors alone do not warrant equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 652 (2010) ("the circumstances of a case must be 'extraordinary' before equitable tolling can be applied"); *see also Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (explaining that a litigant's *pro se* status, incarceration, lack of legal training, lack of legal representation, ignorance of legal rights,

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<sup>3</sup> The court notes that its docket is replete with timely petitions submitted by similarly situated litigants.

and unfamiliarity with legal process are not “rare and exceptional circumstances” warranting equitable tolling).

Esparza further contends his appellate counsel’s failure to timely file his PDR presented the type of extraordinary circumstance that warrants equitable tolling. He argues:

The magistrate judge’s Findings is an example of adhering to ‘mechanical rules’ (which are not even correctly applied here) and ‘archaic rigidity.’ And, the Findings effectively tell Petitioner that he needed to show evidence of ‘bad faith, dishonesty, divided loyalty, or mental impairment’ on the part of appellate counsel. These requirements were rejected by the Supreme Court in *Holland* [v. Florida, 560 U.S. 631, 652 (2010)].

Dkt. 14 at 7-8.

In *Holland*, the Supreme Court affirmed earlier holdings that “a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling.” *Holland*, 560 U.S. at 651-52 (internal quotations and citations omitted). The Court noted that, to be sure, an attorney’s failure to meet filing deadlines suggests simple negligence. *See id.* at 652. However, such conduct does not, in itself, warrant equitable tolling. *Id.*

The Court further explained that equitable tolling might be warranted where the record demonstrated “serious instances of attorney misconduct” in conjunction with counsel’s untimely filing of a pleading. *Id.* at 652. Thus, the Court found a potential basis for equitable tolling where the record indicated a petitioner’s attorney had failed to timely file a federal habeas petition in spite of the petitioner’s many admonitions on the importance of doing so; had apparently not done the research necessary to ascertain the filing deadline despite the fact that the petitioner’s letters went so far as to identify applicable legal rules; had not provided the petitioner with information he had requested so that he could monitor case; and had not communicated with the petitioner over a period of years. *See id.* at 652.

In the instant case, Esparza argues only that his appellate counsel failed to file a PDR on time. *See* Dkt. 14 at 6. He alleges no other misconduct on the part of counsel and he concedes that counsel's failure was the result of an innocent miscalculation of the deadline after consulting the Rules of Appellate Procedure. *See id.* As the Magistrate Judge concluded, this garden variety claim of neglect does not warrant equitable tolling under *Holland*.

#### **IV. Judicial Estoppel**

Finally, Esparza objects to the Magistrate Judge's conclusion that his petition is time-barred on the grounds that the Magistrate Judge failed to properly consider his argument that the state should be judicially estopped from asserting the timeliness issue. As a threshold matter, the court notes that Esparza's judicial estoppel argument was not dispositive of the timeliness issue addressed in the Report. Even if the state were estopped from asserting the issue, as Esparza suggests it should be, the court has authority to consider the timeliness of a § 2254 petition *sua sponte*. *See Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999).

Esparza's judicial estoppel argument also lacks merit. Three nonexclusive factors weigh in favor of judicial estoppel in a given case. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). Esparza establishes none of these factors and he asserts no alternative basis for estoppel.

The first consideration is whether a party advances a position that is "clearly inconsistent" with an earlier position. *See id.* at 750. Esparza contends the state's decision not to file a brief in opposition to his motion for rehearing before the CCA "effectively means that the state did not oppose the relief request in the Motion." Dkt. 9 at 7. He contends the state's silence was equivalent to an admission that he was entitled to consideration of his PDR on the merits. *See* Dkt. 9 at 7. However, the state was entitled to oppose Esparza's motion without briefing, relying on the CCA to do exactly what it did, which was to dismiss Esparza's motion for rehearing on his brief alone. Thus, Esparza

fails to establish that the state advocated a position clearly inconsistent with one asserted in the instant proceeding.

The second consideration in judicial estoppel analysis is “whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determinations and thus poses little threat to judicial integrity.” *See New Hampshire*, 532 U.S. at 750-51 (internal quotations and citations omitted). Esparza contends the state advocated the position that the CCA should review the claims advanced in his PDR on the merits. This position was undisputedly rejected by the CCA. Thus, any attempt by the state to advocate a contrary position in these proceedings does not present a risk of inconsistent rulings which would warrant judicial estoppel.

The third consideration in judicial estoppel analysis is whether allowing a party to advance its new, inconsistent position would prejudice another party. *Id.* at 751. Esparza fails to articulate how the state would derive an unfair advantage or impose an unfair detriment on him if not estopped in the present matter.

In *New Hampshire*, the Supreme Court noted, “In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine’s application in specific factual contexts.” *New Hampshire*, 532 U.S. at 751. However, Esparza does not articulate any specific facts that the Court might consider in weighing his judicial estoppel argument. His conclusory argument that the doctrine applies is subject to summary dismissal.

Additionally, even assuming, *arguendo*, that judicial estoppel was appropriate in the instant case, application of the doctrine would not preclude the state from raising the timeliness issue, as Esparza suggests. Esparza has asserted that the state “did not oppose the relief requested in the Motion for Rehearing, which asked the Court of Criminal Appeals to consider the PDR on its merits.” Dkt. 9 at 7. If judicial estoppel was applied, the state would only be precluded from arguing in the current proceedings that Esparza was not entitled to consideration of the merits of his PDR. This limitation would in no way prevent the state from advancing its arguments regarding when Esparza’s conviction became final, when the limitations period expired, and whether Esparza is entitled to statutory or equitable tolling.

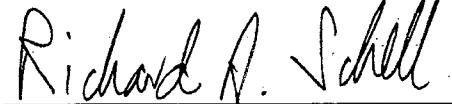
In light of the foregoing, it is **ORDERED** that Esparza’s Objections (Dkt. 14) are **OVERRULED**.

It is further **ORDERED** that the Report and Recommendation (Dkt. 12) is **ADOPTED**.

It is further **ORDERED** that the above-styled Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Dkt. 1) is **DENIED** and that the case is hereby **DISMISSED WITH PREJUDICE**.

It is further **ORDERED** that any motion not previously ruled on is **DENIED**.

**SIGNED** this the 31st day of March, 2017.

  
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RICHARD A. SCHELL  
UNITED STATES DISTRICT JUDGE

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

STEVEN MADINA ESPARZA

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v.

WILLIAM STEPHENS,  
DIRECTOR, TDCJ-CID

CIVIL ACTION NO. 4:14CV694

FINAL JUDGMENT

CONSIDERING the Report and Recommendation entered herein on December 20, 2016 (Dkt. 12), which is hereby adopted for the reasons stated in the Court's Order Adopting Report and Recommendation of the United States Magistrate Judge,

It is **ORDERED AND ADJUDGED** that Esparza's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2254 is **DENIED** and the case is hereby **DISMISSED WITH PREJUDICE**.

Further, it is **ORDERED** that any motion not previously ruled on is **DENIED**.

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

STEVEN MADINA ESPARZA

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§

§

v.

CIVIL ACTION NO. 4:14CV694

WILLIAM STEPHENS,  
DIRECTOR, TDCJ-CID

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REPORT AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE

*Pro se* Petitioner Steven Madina Esparza filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. *See* Dkt. 1. The petition was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

BACKGROUND

On February 11, 2010, Petitioner was charged by indictment with possession of a controlled substance, to-wit: cocaine, in an amount of four (4) grams or more but less than two hundred (200) grams, in a drug-free zone. *See* Dkt. 3-1 at 8. The indictment alleged as a punishment enhancement that Petitioner had a prior felony conviction. *See id.* On the first day of trial, Petitioner appeared and announced via counsel that he had rejected the State's plea offer of twenty (20) year's imprisonment, which reflected the mandatory minimum sentence upon conviction. *See* Dkt. 3-2 at 4. Thereafter, Petitioner entered a guilty plea subject to the trial court's ruling on his motion to suppress the search warrant, with punishment to be assessed by the trial court. *See id.* at 4-8.

At the punishment hearing, the trial court heard argument on Petitioner's motion to suppress and testimony from Petitioner on the issue of punishment. *See* Dkt. 3-3 at 5-12. Thereafter, the trial court overruled the motion to suppress, confirmed that Petitioner's guilty plea had been freely and voluntarily made, and sentenced Petitioner to forty-five (45) years' imprisonment. *See id.* at 12.

Petitioner appealed and, on July 18, 2012, the Eighth Court of Appeals of Texas affirmed the judgment. *See* Dkt. 3-4. Petitioner filed a motion for rehearing, which was denied on August 15, 2012. *See* Dkt. 7-1.

On October 5, 2012, Petitioner filed a petition for discretionary review ("PDR") in the Texas Court of Criminal Appeals ("CCA"). *See* Dkt. 6-4. The CCA dismissed the PDR as untimely filed on November 27, 2012. *See* Dkt. 7-1. Petitioner filed a motion for rehearing, which the CCA denied on January 9, 2013. *See* Dkt. 3-5, 6-2.

On November 10, 2013, Petitioner filed a state application for the writ of habeas corpus, pursuant to Texas Code of Criminal Procedure, Article 11.07. *See* Dkt. 3-6. On June 25, 2014, the CCA denied the application without written order on the findings of the trial court. *See* Dkt. 3-10.

Petitioner filed the instant petition on November 2, 2014. *See* Dkt. 1. He requests that the judgment and sentence be vacated based on ineffective assistance of his trial counsel. Respondent argues Petitioner's substantive claims lack merit and, further, the petition should be dismissed as time-barred. *See* Dkt. 7.

### ANALYSIS

As a threshold matter, the Court must resolve Respondent's claim that the petition filed on November 2, 2014, should be dismissed as time-barred. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs the timeliness of the § 2254 petition in this case. The AEDPA subjects defendants seeking federal habeas review to a one (1) year filing deadline, which generally runs from "the date on which the judgment became final." 28 U.S.C. § 2244(d)(1). A conviction is final when a defendant's options for further direct review are foreclosed. *See United States v. Gamble*, 208 F.3d 536, 537 (5th Cir. 2000); *United States v. Thomas*, 203 F.3d 350, 352 (5th Cir. 2000).

The parties disagree on the date Petitioner's conviction became final for purposes of AEDPA's statute of limitations. Petitioner contends he could have sought Supreme Court review of the judgment of conviction after the CCA's dismissal of his PDR as untimely and denial of his subsequent motion for rehearing. He argues his conviction did not become final until the expiration of the ninety (90) day period for filing a petition for writ of certiorari under Supreme Court Rule 13. This argument lacks merit.

Supreme Court review of a state judgment of conviction is available, pursuant to Rule 13, after a merits ruling by the highest state court. *See SUP.CT. R. 13.1* (petition for writ of certiorari available "after entry of the order *denying* discretionary review"); *Gonzalez v. Thaler*, -- U.S.--, 132 S. Ct. 641, 656 (2012) ("We can review, however, only judgments of a 'state court of last resort' or of a lower state court if the 'state court of last resort' has denied discretionary review.") (citing SUP. CT. R. 13.1). But "gratuitously adding ninety days for finality of judgment is . . . improper when a PDR is refused as untimely filed." *Bautista v. Dretke*, 3:04-CV-0751-P, 2004

WL 2049301, at \*3 (N.D. Tex. Sept. 13, 2004), *report and recommendation adopted*, 3-04-CV-751-P, 2004 WL 2534234 (N.D. Tex. Nov. 4, 2004).

Here, the CCA refused Petitioner's PDR as untimely without reaching the merits of his claims. Respondent correctly notes the CCA's "order denying [Petitioner's] motion for rehearing was not an order denying review" subject to the Supreme Court's jurisdiction. Dkt. 7 at 8 n. 4. Accordingly, Petitioner exhausted his options for direct review and his conviction became final on the date his state PDR was due under Texas law.

Under Texas Rule of Appellate Procedure 68.2(a), a defendant's first PDR "must be filed within 30 days after either the day the court of appeals' judgment was rendered or the day the last timely motion for rehearing or timely motion for en banc reconsideration was overruled by the court of appeals." Petitioner's last timely motion for reconsideration was overruled by the Eighth Court of Appeals on August 15, 2012. *See* Dkt. 7-1. Under Rule 68.2(a), his PDR was due thirty (30) days later on September 14, 2012. *See also* TEX. R. APP. P. 4.1. The one (1) year limitations period under AEDPA began to run the next day, September 15, 2012, and expired on Monday, September 16, 2013. *See Flanagan v. Johnson*, 154 F.3d 196, 202 (5th Cir. 1998); FED. R. CIV. P. 6(a).

Because, his federal petition was filed over a year after the September 16, 2013, deadline, the Court must consider Petitioner's argument that he is entitled to tolling of the statute of limitations. Under AEDPA, the one (1) year limitations period is automatically tolled for "the time in which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). In order to toll the period of limitations, state habeas applications must be filed before expiration of the limitations period. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000).

Petitioner filed a state habeas application on November 10, 2013, which was pending until June 24, 2014. *See* Dkt. 3-6, 3-10. However, the application was filed fifty-five (55) days after the limitations period expired. Therefore, Petitioner's state habeas application does not toll the limitations period.

AEDPA's statute of limitations is also subject to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). The petitioner bears the burden of proving he is entitled to equitable tolling. *See Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000). "A habeas petitioner is entitled to equitable tolling only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (quoting *Holland*, 560 U.S. at 649); *see also Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998) (noting equitable tolling is not appropriate absent a showing of "rare and exceptional circumstances" that prevented timely filing). "Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate." *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). The Fifth Circuit has held that proceeding *pro se*, illiteracy, deafness, lack of legal training, unfamiliarity with the legal process, and claims of actual innocence are insufficient reasons to equitably toll the statute of limitations. *See Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir. 2000).

Petitioner argues he is entitled to equitable tolling because his appellate counsel inexcusably neglected to file a state PDR or request an extension of time before the filing deadline passed. He argues his attorney's unprofessional conduct prevented him from timely filing his federal petition. *See* Dkt. 9 at 10. However, he fails to explain how counsel's alleged misfeasance in filing the PDR prevented him from filing his *pro se* federal petition for nearly two (2) years after the CCA dismissed the PDR as untimely. Moreover, equitable tolling refers to the tolling of the

one-year limitations period on equitable grounds. *See Bautista*, 2004 WL 2049301 at \*2. It has no application before a conviction becomes final. *See id.* Because counsel's alleged conduct before the PDR was due occurred before Petitioner's conviction was final, it does not warrant equitable tolling of the statute of limitations.

Petitioner also contends external obstacles impeded his ability to file a federal petition during the limitations period. He claims equitable tolling is warranted based on his status as "an incarcerated prisoner with limited financial resources" and his alleged inability to obtain a suitable attorney to replace appellate counsel during the limitations period. Dkt. at 11. Petitioner makes no specific factual allegations in support of his argument that his indigence and status as a *pro se*, inmate litigant prevented him from filing a federal petition for nearly two (2) years after his conviction became final. Without some showing of extraordinary circumstances, these factors are insufficient to warrant equitable tolling of the statute of limitations. *See Felder*, 204 F.3d at 173 (5th Cir. 2000).

Furthermore, it is evident from the record that Petitioner did not pursue his rights diligently. As of January 9, 2013, the CCA had dismissed Petitioner's PDR as untimely filed and denied his motion for rehearing. Yet, Petitioner waited until November 10, 2013, over three hundred (300) days later, to file a state habeas application. Following the denial of his state habeas application, Petitioner waited an additional one hundred and thirty (130) days to file his federal petition. These delays of Petitioner's own making do not evince due diligence. Accordingly, Petitioner's request for equitable tolling should be denied.

Petitioner filed his § 2254 motion on November 2, 2014, more than a year after the applicable limitations period expired. He has shown no valid statutory or equitable basis for tolling the statute of limitations. Accordingly, his Petition should be dismissed as time-barred.

CERTIFICATE OF APPEALABILITY

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

A certificate of appealability may issue only if a movant has made a “substantial showing of the denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(c)(2). “In order to make a substantial showing, a petitioner must demonstrate that ‘reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.’” *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003) (quoting *Slack*, 529 U.S. at 484). “When the district court has denied a claim on procedural grounds, however, the petitioner must also demonstrate that ‘jurists of reason would find it debatable whether the district court was correct in its procedural ruling.’” *Id.* (quoting *Slack*, 529 U.S. at 484).

In this case, there is no likelihood that reasonable jurists could debate the denial of the petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court find that Petitioner is not entitled to a certificate of appealability as to his claims.

RECOMMENDATION

The Court recommends Petitioner Esparza's Petition for a Writ of Habeas Relief pursuant to 28 U.S.C. § 2254 (Dkt. 1) should be **DENIED** and that the case be **DISMISSED WITH PREJUDICE**. It is further recommended that a certificate of appealability be **DENIED**.

Within fourteen (14) days after service of the Magistrate Judge's report, any party must serve and file specific written objections to the findings and recommendations of the Magistrate Judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's Report and Recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), superseded by statute on other grounds, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten (10) to fourteen (14) days).

SIGNED this 20th day of December, 2016.



\_\_\_\_\_  
KIMBERLY C. PRIEST JOHNSON  
UNITED STATES MAGISTRATE JUDGE

**Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001**

**Scott S. Harris**  
Clerk of the Court  
(202) 479-3011

October 1, 2018

Mr. Steven Madina Esparza  
Prisoner ID # 1705049  
Allred Unit  
2101 FM 369 N.  
Iowa Park, TX 76367

Re: Steven Madina Esparza  
v. Lorie Davis, Director, Texas Department of Criminal Justice,  
Correctional Institutions Division  
Application No. 18A333

Dear Mr. Esparza:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Alito, who on October 1, 2018, extended the time to and including December 7, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,

**Scott S. Harris, Clerk**

by *Melissa Blalock*  
Melissa Blalock  
Case Analyst

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