

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

No. 17-40908

STEVEN MADINA ESPARZA,

Petitioner-Appellant

v.

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

Respondent-Appellee

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

O R D E R:

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

No. 17-40908

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